115-188

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~176.~~ 13

ARTHUR NORRINGTON, TRADING AS A. NORRINGTON AND COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES A. WRIGHT, CLEMENT A. GRISCONI, AND FRANK L. NEAL, TRADING AS PETER WRIGHT AND SONS,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 8, 1881.

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1 UNITED STATES,
Eastern District of Pennsylvania, } *sct:*

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you, between Arthur Norrington, a subject of the Kingdom of Great Britain, trading as A. Norrington and Company, plaintiff, and James A. Wright, Clement A. Griscom, and Frank L. Neal, citizens of the State of Pennsylvania, trading as Peter Wright & Sons, defendants, in a plea of trespass on the case, a manifest error has intervened, to the great damage of the said Arthur Norrington, a subject of the Kingdom of Great Britain, trading as A. Norrington and Company, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the Justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this second day of November, A. D. one thousand eight hundred and eighty-one, and in the one hundred and sixth year of the Independence of the said United States.

SAMUEL BELL,
Clerk of Circuit Court U. S.

2 THE UNITED STATES OF AMERICA, *ss:*

To James A. Wright, Clement A. Griscom, and Frank L. Neall, citizens of the State of Pennsylvania, trading as Peter Wright and Sons, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Arthur Norrington, a citizen of the Kingdom of Great Britain, trading as A. Norrington and Company, plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this 25th day of Nov., in the year of our Lord one thousand eight hundred and eighty-one.

WM. BUTLER, *Judge.*

Service accepted for defendants in error above named.

R. C. McMURTRIE.

3 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

ARTHUR NORRINGTON, a citizen of the Kingdom of Great Britain, trading as A. Norrington and Company,
vs.
JAMES A. WRIGHT, CLEMENT A. GRISCOM, FRANK L. NEALL, citizens of the State of Pennsylvania, trading as Peter Wright and Sons.
} No. 61. April Session, 1881.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit.

It is thus contained:

Be it remembered that on the 5th day of August, A. D. 1881, the attorneys for the plaintiff and defendants come into court here and file an agreement for entry of amicable action case, which said agreement, being read, is as follows, to wit:

4 U. S. C. C., E. D. of Penn'a.

ARTHUR NORRINGTON, a citizen of the Kingdom of Great Britain, trading as A. Norrington and Company,
vs.
JAMES A. WRIGHT, CLEMENT A. GRISCOM, and FRANK L. NEALL, citizens of the State of Pennsylvania, trading as Peter Wright and Sons.
} Amicable action case.

It is hereby agreed that an amicable action case in above form may at any time hereafter be entered in the circuit court of the United States for the eastern district of Pennsylvania, with the same effect as if a summons had been issued on the thirteenth day of July, 1881, returnable to the first Monday of August, 1881, and had been duly served by the marshal, and so returned by him.

(Signed) R. C. McMURTRIE,
For Defendants.

(") SAMUEL DICKSON,
Per WM. MORRIS,

Aug. 1, '81. *Att'y for Plaintiff.*

5 (Endorsed:) 61. April sess., 1881. U. S. C. C. Norrington *vs.* Wright. Agreement for entry of amicable action case. Filed Aug. 5, 1881. Dickson, for pl'ff. McMurtrie, for def'ts.

And afterwards, to wit, on the day and year last aforesaid, the plaintiff, by his attorney, Samuel Dickson, Esq., comes into court here and files his narr., which, being read, is as follows:

In the Circuit Court of the United States for the Eastern District of Pennsylvania, of ——— Sessions, 1881, No. ——.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

James A. Wright, Clement A. Griscom, and Frank S. Neall,
6 citizens of the State of Pennsylvania, trading as Peter Wright
and Sons, were summoned to answer Arthur Norrington, a citizen of the Kingdom of Great Britain, trading as A. Norrington and Company, of a plea of trespass on the case, &c.

Whereupon the said plaintiff, by his attorney, Samuel Dickson, complains: For that whereas, heretofore, to wit, on the 19th day of January, A. D. 1880, to wit, at Philadelphia aforesaid, the said defendants bargained for and purchased of the said plaintiff a large quantity of goods, to wit, about five thousand tons old T iron rails; and the said plaintiff then and there, at the request of the said defendants, sold to the said defendants the said large quantity of goods at the price or sum of forty-five dollars per ton of 2,240 pounds, custom-house weight, ex. ship at Philadelphia, said goods or rails to be shipped from European ports at the rate of about one thousand (1,000) tons per month, beginning at a certain time, to wit, February, 1880, but the whole of said goods or rails to be shipped before August 1, 1880, settlement cash on presentation of bills, accompanied by custom-
7 house certificate of weight, the said plaintiff, sellers, as aforesaid,
to notify buyers, to wit, the said defendants, of shipments, with vessels' names, as soon as known by them; and in consideration thereof, and that the said plaintiff, at the like special instance and request of the said defendants, had promised to deliver the said goods in manner and form as aforesaid, the said defendants had agreed to accept the said goods and to pay for the same; and although the said plaintiff afterwards, to wit, in the months of February, March, April, May, June, and July of the year 1880, did ships the said goods from European ports at the rate of about one thousand tons per month, and although the said plaintiff notified the said defendants of the said shipments made at various times, to wit, in the months of February, March, April, May, June, and July of the year 1880, as soon as known by the said plaintiff; and although the said goods duly arrived at Philadelphia aforesaid, and the said plaintiff was ready and willing at all times to
8 deliver to the said defendants bills, accompanied by custom-
house certificates of weight, at the time of the arrival of said goods, according to said contract; and although the said plaintiff was ready and willing to deliver the said goods to the said defendants, and then and there requested the said defendants to accept

the same and pay for the same, as aforesaid; and although the said plaintiff has been at all times ready and willing to perform his contract in manner and form as aforesaid, yet the said defendants, not regarding their said promises and undertakings, but intending to defraud the said plaintiff, did not or would not, when so requested, nor at any time before or afterwards, accept or receive the said goods, or any part thereof, of and from the said plaintiff, or so pay for the same, or any part thereof, but then and there wholly neglected so to do.

And also for that, whereas, heretofore, to wit, on the day and year aforesaid, at the district aforesaid, the said plaintiff entered 9 into a certain contract with the said defendants, in the following words, to wit:

PHILADELPHIA, *January* 19, 1880.

Sold to Messrs. Peter Wright & Sons, for account of Messrs. A. Norrington & Co., London, five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45.00) per ton of 2,240 lbs., custom-house weight, ex. ship Philadelphia; settlement, cash on presentation of bills, accompanied by custom-house certificate of weight, sellers to notify buyers of shipments, with vessels' names as soon as known by them; sellers not to be compelled to replace any parcel lost after shipment; sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

(Signed) E. J. ETTING.

Which contract was duly accepted by the said defendants, 10 and in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendants, had promised to deliver the said goods or rails; the said defendants had agreed to accept the said goods in manner and form as provided by said contract, and to pay for the same according to said contract; and although the said plaintiff afterwards, to wit, in the months of February, March, April, May, June, and July, of the year 1880, did ship the said goods from European ports at the rate of about one thousand tons per month, and although the said plaintiff notified the said defendants of the said shipments made at various times, to wit, in the months of February, March, April, May, June, and July, as aforesaid, as soon as known by the said plaintiff, and although the said goods duly arrived at Philadelphia, and the said plaintiff was ready and willing at all times to deliver to the said defendants bills, accompanied by custom-house certificates of weight, at the time of the arrival of said goods, according to said contract; 11 and although the said plaintiff was ready and willing to deliver said goods to the said defendants, and then and there requested the said defendants to accept the same and pay for the same as aforesaid; and although the said plaintiff has been at all times ready and willing to perform his contract in manner and form as aforesaid; yet the said defendants, not regarding their said promise and undertaking, but intending to defraud the said plaintiff, did not, or would not, when so requested, nor at any time before or afterwards, accept or receive the said goods, or any part thereof, of and from the said plaintiff, or pay for the same or any part thereof, but then and there wholly neglected and refused so to do.

And also for that, whereas the said defendants, to wit, on the day and year aforesaid, at the district aforesaid, entered into a certain other contract with the said plaintiff in the following words, to wit:

PHILADELPHIA. *January* 19, 1880.

12 Sold to Messrs. Peter Wright & Sons, for account of Messrs. A. Norrington & Co., London:

Five thousand (5,000) tons of old T iron rails, for shipment from a European port or ports at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45.00) per ton of 2,240 pounds, custom-house weight, ex. ship "Philadelphia."

Settlement cash, on presentation of bills, accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments, with vessels names, as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

(Signed) E. J. ETTING.

Which contract was duly accepted by the said defendants, and in consideration thereof, and that the said plaintiff, at the special instance and request of the said defendants, had promised to deliver the said goods to the said defendants, and the said defendants
13 had agreed to accept the said goods and to pay for the same according to the said contract; and although the said plaintiff afterwards, to wit, in the month of February, A. D. 1880, did ship four hundred tons of said rails to the said defendants, and the said defendants did accept the said rails, and although afterwards, to wit, in the months of March, April, May, June, and July of the year 1880, the said plaintiff did ship the remainder of said rails from European ports at the rate of about one thousand tons per month, and although the said plaintiff notified the said defendants of said shipments, made at various times, to wit, in the months of March, April, May, June, and July as aforesaid, as soon as known by him, the said plaintiff; and although the said goods or rails duly arrived at Philadelphia, and the said plaintiff was ready and willing at all times to deliver to the said defendants bills, accompanied by custom-house certificates of weight, at the time of the arrival of the said goods or rails according to contract; and although the said plaintiff was ready and willing to deliver said goods
14 or rails to the said defendants, and then and there requested the defendants to accept and pay for the same as aforesaid and as agreed by them; and although the said plaintiff has been at all times ready and willing to perform his contract in manner and

form aforesaid; yet the said defendants, not regarding their said promise and undertaking, but intending to defraud the said plaintiff, did not and would not when so requested, nor at any time before or afterwards, accept or receive the said goods or rails, except as hereinbefore mentioned, or any part thereof and from the said plaintiff, or pay for the same or any part thereof, but then and there wholly neglected and refused so to do.

S. DICKSON *for Pl'ff.*

(Endorsed:) 61. April sess., 1881. C. C. U. S. Norrington *vs.* Wright. Narr. Enter rule on defendants to plead in two weeks a judg't *sec. reg.* Dickson. Filed Aug. 5, 1881.

15 And afterwards, to wit, on the day and year last aforesaid, the defendants by their attorney, R. C. McMurtrie, Esq., file their plea as follows, to wit:

U. S. C. C.

NORRINGTON *vs.* WRIGHT.

Defendants plead *non assumpsit.*
Aug: 5, '81. R. C. McMURTRIE.

(Endorsed:) 61. April sess., 1881. U. S. C. C. Norrington *vs.* Wright. Plea. McMurtrie. Filed Aug. 5, 1881.

16 And thereupon it is ordered that a jury come to try the issue joined in this cause.

And afterwards, to wit, on the 18th day of October, A. D. 1881, come the parties aforesaid, and the jurors of the jury aforesaid being called likewise come, to wit:

1, Chancy A. Bockhoven; 2, T. Russell Dawson; 3, John R. Eyre; 4, Solomon Gilbert; 5, Samuel Holman; 6, Frederick Krammerer; 7, A. Murray McIlvaine; 8, Edward Mentz; 9, James B. Nicholson; 10, Stacy Reeves; 11, William Schall; 12, Benjamin Thomas, who are duly empanelled, returned chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this cause.

And afterwards, to wit, on the day and year last aforesaid, the jurors aforesaid, upon their oaths or affirmations aforesaid, respectively do say, that they find for the defendants.

17 And afterwards, to wit, on the 24th day of October, A. D. 1881, judgment is entered in favor of the defendants on the verdict, and against the plaintiff.

18 And afterwards, to wit, on the 9th day of November, A. D. 1881, the plaintiff, by his attorney, Samuel Dickson, Esq., comes into our said court here and files his bill of exceptions, the same having been sealed by the court, in the words following, to wit:

Be it remembered that in the April sessions, A. D. 1881, came Arthur Norrington, a subject of the Kingdom of Great Britain, trading as A. Norrington & Co., into the circuit court for the eastern district of Pennsylvania, and impleaded James A. Wright, Clement A. Griscom, and Frank L. Neal, trading as Peter Wright & Sons, in a certain plea of trespass on the case, &c., in which the said plaintiff declared *prout narr*, and the said defendants pleaded *prout pleas*, and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the city of Philadelphia, before the Honorable William McKennan and William Butler, judges of the said court, on the eighteenth *and* day of October, A. D. 1881, the aforesaid issue between the said parties came to be tried by a jury of the said district, for that purpose duly impan*n*elled (*prout* list of jurors), at which day came as well the said plaintiff as the said defendants, by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issues, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the plaintiff, to maintain the issue on the part of the plaintiff, to prove the issue on the behalf of the plaintiff, offered the following evidence:

Edward J. Etting sworn, and examined by Mr. Dickson:

Q. What is your business?
A. Iron broker and commission merchant.
Q. Did you make a contract between the plaintiff and defendant-?
A. Yes, sir.
Q. Was the contract subsequently reduced to writing?
19 A. Yes, sir.
Q. Have you the contract?
A. I have.
Q. Please produce it. You have the original there, have you not?
A. Yes, sir. (Producing the same.)
Q. Was that accepted by the defendants?
A. Yes, sir.

(Contract offered in evidence, dated Philadelphia, January 19th, 1880.)

(Note.—The contract, correspondence, and other documents are printed in the appendix.)

Q. Did you look after shipments as they arrived?
A. I notified the purchasers of all the shipments as they arrived.
Q. Notified them as they arrived?
A. As I was advised from A. Norrington & Co.; I advised Peter Wright & Co. of the shipments.

(Letter produced and read in evidence.)

Q. Had you any communication on the 16th of April from Norrington & Co. which you communicated to the Wrights?
A. Yes, sir.
Q. State what they told you in reply.
A. That they did not wish the iron shipped faster than the contract quantity.

On the 8th of May I telegraphed at Wright's request, “At what rate per ton will you postpone shipment, Wright's contract?” and the reply is, “Not in our power to postpone shipments.”

Q. Were those cables sent at the request of the defendants?

A. Yes, sir; I have here cable of the 22d of April, “Old double-head iron rails, don't want any more at present, don't anticipate, rather postpone shipment.”

20 Q. It appears by your correspondence that you sold the iron which arrived by the “Marianna” and the “Hazelwood?”

A. Yes, sir.

Q. At what price?

A. I sold one cargo at twenty-five dollars, and the other at twenty-five dollars and fifty cents per ton.

Q. What did you do with the rest of the iron that did arrive?

A. It was stored and subsequently sold.

Q. When?

A. In the early part of this month—of October, 1880.

Q. Since suit brought?

A. Yes, sir.

Q. At what price?

A. Twenty-seven dollars and fifty cents per ton.

Q. How did that compare with the market price?

A. It was at least one dollar and fifty cents above the market. From one dollar to one dollar and fifty cents per ton.

Q. In your letter, you have said to the defendants that you would let them know when you made the sale. How does it come that you didn't say anything about it?

A. The purchasers were anxious that nothing should be known or said about the sales, and it being so much above the market price, I thought it was well to assent. More than that, I was directed to do so by the bankers, S. & W. Welsh.

Q. Were the prices obtained for the “Marianna” and “Hazelwood” cargoes full market price?

A. The full market price at the time of sale.

Q. What was the market price in June; was it more or less than twenty-seven dollars and fifty cents?

A. It was from twenty-four dollars and fifty cents to twenty-six dollars a ton. There was very little iron sold.

Q. What were the prices during July and August?

21 A. I took a little slip of the sales I made during those months. I find in July there were sales at twenty-five dollars, twenty-three dollars and fifty cents, and twenty-three dollars.

Q. What was it in August?

A. In August the prices were somewhat higher. The sales were at twenty-five dollars and twenty-six dollars.

Q. What was it in September?

A. Twenty-five dollars to twenty-six dollars.

Q. What were they in April and May?

A. I couldn't say. In April I made no sales. It was somewhere about, I suppose, thirty-six dollars or thirty-seven dollars in April.

In May I sold at thirty-eight dollars; in March, I beg your pardon, it was thirty-eight dollars.

Q. What was it in May?

A. As I stated before, twenty-five dollars and fifty cents and twenty-five dollars. In June, twenty-four dollars to twenty-six dollars; July, twenty-three dollars and fifty cents and twenty-three dollars.

Q. Bills of lading and custom-house certificates of weights are in the possession of whom?

A. S. & W. Welsh. They received them, made out the bills, and attended to that portion of the business.

Cross-examination by Mr. McMURTRIE:

Q. What was the price of iron on the 1st of February?

A. I made a number of sales in February. On the 2nd I sold thirty-eight and one-half; on the 13th, forty-two; on the 16th, forty-three; on the 20th, forty-three and one-half.

Q. That was the highest price after this contract, was it?

A. I think it was, sir; although I did hear of some higher; I don't remember positively.

22 Q. Do you know when the cargoes, or the first one of the cargoes—what we call the March cargoes—the one not paid—when the custom-house weights were first obtained?

A. I know nothing of that.

Q. Did you know that the custom-house weights were not obtained for either of these March shipments before the 1st of June?

A. No, sir; I know nothing of the rails after arrival.

Q. You don't know the fact then as a matter of your own knowledge that the custom-house weights were ever obtained for the March shipments?

A. No, sir

Q. From what you have said, I think inadvert*a*ntly, I think one would understand that your telegram on the 22d of April was a message volunteered, or originated from the Wrights to be sent to Norrington; did you mean us to understand that? You have read the telegram here which you sent to the Norringtons from the Wrights—a message from the Wrights. What I want to know is, if any one would infer from that that they came to you and asked you to deliver that message?

A. I would like to see which one it is.

Q. I refer to the one which you have just read, "Don't want any more rails."

A. I have it now. Yes, sir; Wrights told me that they did not want any more rails at present.

Q. Will you be good enough to turn back to the telegram which you received on the 21st of April from Norrington?

A. I have a cable from them.

Q. Please read it.

A. "I have shipped further five hundred and fifty double-heads against Wright's contract. Would they like about five hundred tons more, same section? Shipment about fortnight. Cable selves."

23 Q. Is this a copy of the telegram which you sent in reply to that message of Norrington's? It reads, "Old double-headed rails. Don't want any more at present. Don't anticipate. Rather postpone shipments."

A. Yes, sir.

Q. Now, on the 8th of May you sent a telegram in these words, which you have read: "What rate per ton will you postpone shipment, Wright's contract?" Did not the Wrights ask you to telegraph to ascertain at what price they could obtain a postponement of those shipments on the 8th of May?

A. It so appears, sir.

Q. Did not your people decline to postpone it even at a price?

A. Yes, sir; their reply was that they could not, having already chartered the vessels.

REYNOLD THOMAS, sworn and examined.

By Mr. DICKSON:

Q. Are you connected with the house of S. & W. Welsh?

A. Yes, sir.

Q. Had they advanced upon this contract?

A. Yes, sir.

Q. And held the bills of lading?

A. Yes, sir.

Q. When the "Snap" arrived how was that settled for?

A. A bill was made out and taken to them by one of our clerks. That bill was paid.

Q. How about the "Marianna IV."?

A. The "Marianna IV." arrived, the captain notified me that he was ready to take out the rails. I went over to Mr. Wright's, and subsequently saw Mr. Webb, one of the gentlemen connected with Mr. Wright's house. Mr. Webb told me to send the vessel to Girard Point. The captain afterwards came back and said
24 there was no berth for him at Girard Point, and I saw Mr. Webb again. He said, "We very much want the vessel to go to Girard Point, and like you to do all you can to get her there, but if you cannot get her there you may discharge her where she is."

Q. That was at Hoffman's?

A. Yes, sir; I then saw the captain again and insisted upon his going to Girard Point, and he did take the vessel to Girard Point and brought her back again, saying that he was refused a berth when he got there.

Mr. MCMURTRIE:

Q. Then she unloaded at Hoffman's?

A. No, sir; because on the same day we received this note, or rather Mr. Etting received a note, from Messrs. Wright, making that trouble about the contract.

Q. The same day?

A. Yes, sir.

Mr. DICKSON:

Q. Refusing to take it?

A. Yes, sir; that caused a great deal of delay.

Q. How long was it prior to receiving that letter that you first saw Mr. Webb?

A. About three days.

Q. At whose request was the cablegram sent?

A. Mr. Etting told me that he had received orders from Messrs. Wrights to send the "Hazlewood" to Hoffman's wharf. In the line of my duty I ordered the vessel to Hoffman's wharf.

Q. Do you remember when she was discharged?

A. I don't remember the date exactly.

Q. Had she been discharged on the day that you heard Etting had received that letter from Peter Wright?

A. She had been discharged and the rails were stored.

Mr. McMURTRIE:

Q. Do you say the rails were stored on the 18th of May?

25 A. I don't remember the date; the rails were in Hoffman's storage yard when Mr. Etting received notice that the contract would not be kept.

WILLIAM McLAUGHLIN sworn, and examined by Mr. DICKSON:

Q. Are you connected with the house of S. & W. Welsh?

A. Yes, sir.

Q. Did you make out and present the bills with the custom-house certificate of weights for this iron?

A. I did; yes, sir.

Q. Did you receive a settlement for the cargo of the "Snap"?

A. Yes, sir.

Q. (Paper shown witness). Is that the custom-house certificate of weight for the "Hazelwood"?

A. Yes, sir.

Mr. McMURTRIE: That is dated May 17th.

Mr. DICKSON: "Marianna Fourth" arrived May 8th; custom-house certificate June 9th; amount, four hundred and forty-one tons four hundred and eighty pounds.

By Mr. DICKSON:

Q. Were the custom-house certificates of weight for all others presented?

A. Yes, sir.

By Mr. McMURTRIE:

Q. In the case of the "Marianna" and the "Hazelwood" the bills and the custom-house certificates were presented together at the same time?

A. Yes, sir.

Q. Do you know whether they were presented June 9th, or after the date of the bill, or what?

A. I either presented them the day they were made out or the following day; I may have received the custom-house certificates after three o'clock, too late to receive the payment.

26 By Mr. Dickson:

Q. "Colombo Carolina," June 23d, five hundred and fifty tons seven hundred and forty pounds.

Mr. McMurtrie: I do not think you need trouble yourself further about anything else. It is a fact that we consented to the sales, and there is no dispute as to the balance. If we hadn't the right to do what we did, of course we are in for it.

Mr. Dickson: The plaintiff offers bills and custom-house certificates of weights for the remaining cargoes.

Q. Do you know anything about what was done with the "Marianna" or the "Hazelwood" yourself?

A. No, sir.

Q. You went on and presented all those bills from time to time, and were refused payment?

A. Yes, sir.

Cross-examination by Mr. McMurtrie:

Q. Who made out the bills?

A. I made them out.

Q. How did you ascertain what the quantities were?

A. From the custom-house certificate of weight.

Q. Had you any knowledge until you saw the custom-house certificate of weight what the weights were?

A. No, sir; that is the landed weight.

Q. You mean by landed weights, of course, the weights on landing what the thing actually weighs when turned out of the vessel and weighed on the wharf?

A. Yes, sir.

Q. I understand that you have no knowledge of the landing weights until the weighing by the custom-house?

A. No, sir.

27 Mr. Dickson:

Q. Have you the bills of lading?

A. Yes, sir.

Mr. McMurtrie:

Q. The bills of lading made a weight, of course, but that is immaterial, as the contract requires the custom-house weight.

The Witness: I have a copy of one of the bills of lading, but I can get the original of it.

Plaintiff offers in evidence the contract, correspondence, bills of lading, invoices, and custom-house weights, *prout* the same.

And to maintain the issue on their behalf the defendant- called F. L. Neal, who was sworn and examined as follows:

By Mr. McMurtrie:

Q. You are a member of the defendants' firm?

A. Yes, sir.

Q. There are a number of partners:

A. Three.

Q. State, if you please, what members of your house, and what persons in your employ, this business of the Norrington contract was entrusted to and managed by.

A. Myself, as a member of the firm, and Mr. Blakey, as the manager of our importing department.

Q. All the correspondence with Mr. Etting went through the hands of one of you two gentlemen, I suppose, jointly, did it not?

A. Yes, sir.

Q. On the arrival of the "Snap," had your house any knowledge that there had been no other shipment made in February?

A. No, sir.

Q. When did your house first ascertain what were the dates
28 of the shipments? I mean the dates of any of the shipments
except the "Snap," for, of course, you ascertained that when
it arrived.

A. We first ascertained that date on the receipt of a memorandum from Mr. Etting that was delivered to us after the 9th of May and before the 14th of May.

Q. (Paper shown witness.) Look at that paper and say whether that is the paper?

A. Yes, sir; that is the paper.

Q. This memorandum was written for, was it not?

A. Yes, sir; a letter was addressed to Mr. Etting asking that information.

Q. (Letter dated 6th May shown the witness.) Look at that letter and state if that was it?

A. That letter was written by us to Mr. Etting May 6th.

Q. That is the letter which produced the memorandum from Mr. Etting?

A. Yes, sir.

Q. After receiving that memorandum, was there any act done on your part; and if so, what recognizing the contract as being in force?

A. There was no act to my knowledge.

Q. What did you do next after receiving this memorandum?

A. We consulted our attorney.

Q. I mean to say what did you do next with the plaintiff's?

A. I think the next thing done was to write him the letter of May 14th.

Q. (Showing the witness letter dated May 14th.) Is that the letter which you wrote?

A. That is the letter which we wrote on the receipt of the memorandum from Mr. Etting.

Q. Was there any other act in reference to the contract in the interval?

A. Not to my knowledge.

29 (Letter May 6th, defendant to Mr. Etting, and also memorandum from Mr. Etting in reply, read by counsel.)

Q. When were the cargoes of the "Marianna" and the "Hazelwood" first tendered to you?

A. Do you mean the tender or the notification?

Q. I don't mean the notification of the arrival. I mean to say when were you first informed that the custom-house weights had been ascertained, and what they amounted to?

A. I think some time in June. The records will show. I cannot tell you from memory.

Cross-examined by Mr. Dickson:

Q. When were you notified that they were in the stream?

A. The "Marianna," the 4th, we were notified of just previous to the 10th of May, I think. The records will show. The "Hazelwood," I have no recollection of the time exactly.

Q. Were not you notified of the "Hazelwood" before the "Marianna"?

A. Yes, sir.

Q. And before writing that letter of May 6th?

A. I cannot say. I think we were.

Q. You ordered her to go to Hoffman's wharf?

A. We requested that she be sent to Hoffman's wharf; yes, sir.

Q. Did not you know at the time you requested her to go to Hoffman's wharf that one thousand tons had been shipped in the month of February?

A. No, sir.

Q. Did you not know, before writing the letter of the 6th of May, that the one thousand tons had not been shipped in the month of February?

30 A. No, sir; we did not know.

Q. On the 6th of May, or whatever time it was, when the "Hazelwood" and "Marianna" arrived, and you ordered them to go to Girard Point and Hoffman's wharf, did you then believe—more than sixty days having elapsed after the 29th of February—did you then believe or assume that the balance of the thousand tons had been shipped in the month of February?

A. We assumed that the shipment had been made in conformity with the contract.

Q. And didn't have reason to suspect the contrary?

A. No, sir.

Q. And didn't suspect it?

A. Not until several days after that.

Q. Do you mean to say that you passed the matter over as a matter of indifference to you, or that you really conscientiously assumed that the shipment had been made in accordance with the contract?

A. Knowing nothing to the contrary, we assumed that the contract would be complied with.

Q. Did you think about it at all?

A. Yes, sir.

Redirect examination by Mr. McMurtrie:

Q. Was there not a discussion between yourself, Mr. Blakey, and myself as to what had been the dates of the shipments?

A. Yes, sir.

Q. You remember there was such a discussion?

A. I do remember.

Q. How long did that occur before the letter of May 6th was written?

A. The discussion occurred either on the 5th of May or on the morning of May 6th; either one or the other.

31 Q. It was in consequence of that discussion that that letter was written to Mr. Etting?

A. Yes, sir.

Q. Do you remember the fact whether or not you consulted Mr. Etting's advices to see if he had informed you before that letter was written?

A. We did; we looked at all his letters.

Q. And found, as the letter stated, that there were no dates mentioned?

A. No dates mentioned.

Q. You remember yourself calling attention to the fact that the dates of shipment might have been very different from the dates of notification, in consequence of the shipment being made by one man, and then those shipments purchased by Mr. Norrington and applied to this contract?

A. I remember calling your attention to that.

Q. As the reason why you could not draw any inferences from the notifications as to what the dates were?

A. Yes, sir.

Q. Those bills of lading that have been produced show that that was the way Norrington did actually deal in some instances?

A. Yes, sir.

Q. (Bills of lading handed to witness.) Look at those bills of lading and say whether there is anything on those papers which enables any man to tell when Norrington became the owner of those cargoes?

A. I find five bills of lading here, or five copies of bills of lading of five different shipments shipped by other parties than Norrington & Co.; they are endorsed in blank by those parties who shipped the goods without date, therefore not indicating in any way at what time they came into the possession of Norrington & Co.

Thomas Blakey sworn, and examined by Mr. McMurtrie:

Q. You are in the employ of Peter Wright & Sons?

32 A. Yes, sir.

Q. What department have you charge of?

A. Their importation department.

Q. Name every person in that house who had anything to do with the Norrington contract from the beginning to the end.

A. I was in Europe when that contract was made. I arrived home on the 11th of March. Necessarily Mr. Neal or those in my department.

Q. Say from the 11th of March down, who in your establishment took charge of that business, received the correspondence, and wrote the correspondence and advised, consulted, and acted?

A. Either Mr. Neal or myself.

Q. Anybody else?

A. Nobody else. The other members of the firm not at all; one of my assistants, Mr. Webb, is present; I think he also gave some notification.

Q. Was there anything done or said to the other side, or anything known about this contract except by you two people?

A. No; not to my knowledge.

Q. On the arrival of the "Snap" had you any knowledge, or had you any suspicion that there had been no compliance with the shipment in February of a thousand tons?

A. None at all.

Q. When did you first know of a suspicion existing on the part of the purchasers of a non-compliance with the contract in regard to the quantities of the shipments?

A. The first suspicion that we had was when we received notification of large quantities, either the third of May, I am not certain whether that was included in this of the 24th of April, but they all came in together, about two thousand tons, I think; we were notified of these within a few days. That was the first idea we had of suspecting.

33 Q. What did you do in consequence of this suspicion? In the first place, who did you discuss with as to whether or not anything had been done?

A. Mr. Neal I discussed it with, and also I discussed it with Mr. McMurtrie.

Q. What steps did you take before writing to these gentlemen to find out if you could ascertain what were the dates of the shipments?

A. In answer to a question from you we referred to the correspondence we had received and found that none of the correspondence gave the dates of shipment up to that time.

Q. Do you remember the fact being stated that the mode of performance—that is to say, the capacity of Norrington & Co. to buy cargoes afloat rendered it impossible to ascertain from the dates of notification what were the dates of shipment?

A. Yes, sir.

Q. Look at this bill of lading of the "Anna Maria." That was one of the vessels tendered to you?

A. Yes, sir.

Q. That is dated the 22d of May, the day of shipment of that vessel. Now turn to the date when that shipment was notified to you by Mr. Norrington or his agent.

A. I am speaking from this memorandum which he made up from the original correspondence, June 8th.

Q. What, therefore, was the interval between the day of that shipment and the day of notification?

A. Seventeen days or eighteen days.

Q. The "Nimbus"—what was the date of the lading of the "Nimbus?"

A. The date of the bill of lading is 5th June, from Bremen.

Q. What was the date of the notice?

A. July 10th.

Q. That is thirty-five days, isn't it, between the shipment and the notice?

34 A. Yes, sir.

Q. Therefore, there was at least one case in which there was thirty-five days between the date of the shipment and the date of notification?

A. Yes, sir.

Q. Before you wrote to Mr. Etting, had you exhausted all means in your power of ascertaining what were the dates of shipment?

A. We had no means whatever; but the document would not necessarily comes to us; the only way we could know would be by advice from Mr. Etting.

Q. It was in consequence of that that you wrote that letter?

A. Yes, sir.

Q. After receiving the notice of what were the dates of shipment, the next act was the notification of rescission, the 14th?

A. Yes, sir.

Q. Between these two dates was there anything done on your part which assumed the existence of the contract; any act done to the other side?

A. Not to my knowledge, whatever.

Cross-examination by Mr. Dickson:

Q. You have referred to the bills of lading; isn't it a very common thing for the shipper to have his broker ship iron for him and let the bills of lading be taken in his own name, and transfer it afterwards by endorsement?

A. Do you mean abroad or here?

Q. Everywhere?

A. Well, yes, sir; I think that is done.

Q. The fact, therefore, that the bills of lading are not in the name of Norrington & Co. originally, don't show at all that they did not ship the iron?

35 A. Not necessarily. It shows that they are not the shippers of the iron certainly, whether they owned it or not. It is shipped in another name.

Q. They might have been the principals, and that name might have been merely the name of the broker or shipping agent?

A. Yes, sir. I would not be prepared to say that from the fact that the bills of lading is made out in somebody else's name, that Norrington & Co. had no interest in it certainly.

Q. Do you mean to say that at the time when the "Snap" arrived on the 26th of April, and on the 6th of May when the "Marianna" and "Hazelwood" came here, so far as you know no one in the house had any reason to believe or suspect that the whole thousand tons had not been shipped in the month of February?

A. I do mean to say that.

Q. You have said that you had no means of telling when the vessel sailed?

A. No, I beg your pardon. I said I had no means of knowing when the shipment was made.

Q. Had you the means of telling when the vessel sailed?

A. Not accurately. By referring to the maritime register.

Q. Did you refer to that?

A. No, sir; I didn't.

Q. Did Mr. Webb refer to it?

A. Not to my knowledge.

Q. Did anybody in your office refer to it?

A. Not to my knowledge. I won't say that they didn't refer to it, but I say I don't know that they referred to it.

Q. So far as you know did no one in your office refer to that to find the date of the sailing of the "Snap" and the date of the sailing of these other vessels?

A. Up to that time they did not. You will see from that
36 memorandum that we have got that date since. We made
that memorandum after this suit was started. I never gave any instruction for anything of the sort. The information would not be sufficiently accurate to be of any particular importance.

Q. Isn't it the duty of Mr. Webb, or some of your clerks, to keep informed as to the dates of the sailing of vessels?

A. No, sir.

Q. Isn't it the habit to do that?

A. No, sir; not the invariable habit.

Mr. McMurtrie:

Q. The dates of shipment and the dates of sailing are different things, are they not?

A. Yes, sir.

Frank T. Webb, sworn and examined:

By Mr. McMutrie:

Q. You are in the employ of Peter Wright & Sons?

A. Yes, sir.

Q. You are in the importing department?

A. Yes, sir.

Q. Your department has charge of this branch of the business, such as this?

A. Yes, sir.

Q. Exclusively, or in connection with others.

A. It has charge of all importations.

Q. When did you know anything about this contret at all?

A. I had some knowledge of it from the beginning.

Q. When did you first know or hear of it, or hear the subject discussed as to the non-shipment of the thousand tons in February not having been made?

A. It was upon the writing of the letter of the 6th of May.

Q. You never heard the subject discussed before?

A. I can't remember that I did.

Q. Where was that discussion which led to that letter?

37 A. I don't know that it was a discussion.

Q. You heard the subject spoken of?

A. Yes, sir.

Q. You never heard it spoken of before?

A. No, sir.

Q. Had you any knowledge or belief, or reason to believe, before that that the goods had not been shipped in February?

A. I had not.

Q. Do you know of any means of knowledge possessed by the firm from which they could have known it?

A. I do not.

Defendants offer in evidence letters and other papers produced and identified by witness. And thereupon the defendants contended that there was no evidence to maintain the fourth count, which the plaintiffs' counsel admitted, and added that a verdict was not asked upon that count.

And the defendants further contended that the evidence does not prove the averments of the first, second, and third counts; and also that if the plaintiffs did not perform their contract by shipping about one thousand tons iron in February, and if the defendants did not know or believe that there had been such default when they accepted the cargo of the "Snap," which was paid for, they were entitled to rescind the contract because of such default, as they did by the letter of May 8th.

And the plaintiffs contended that under the contract they had six months in which to ship the five thousand tons, and that any deficiency in the previous months could be made up subsequently, provided that the defendants could not be required to take more than about one thousand tons in any one month; and contended further that even if this were not so that the remedy of the defendants for such default was not by rescission, because the contract was a divisible contract, and the remedy was to deduct the damages caused by the delays in shipments on the part of the plaintiffs.

And thereupon the court instructed the jury that if they believed the testimony of the defendants' witnesses to the effect that
38 they had no notice at the time of accepting the delivery of
the cargo paid for of the failure of plaintiffs to ship about one thousand tons in the month of February, and that immediately upon learning that fact they gave notice of their intention to rescind, they should find for the defendants.

And the plaintiffs thereupon excepted to the direction of the court, that the defendants were entitled to rescind because of the plaintiffs' default in respect of the shipment in February, and to their refusal to instruct the jury that the defendants' remedy was confined to reducing the claim by damages caused by the defaults of the plaintiff in respect of the time of shipments; and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record, the said counsel for the said plaintiffs did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judges at the request of the said counsel for the plaintiffs did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 18th day of October, A. D. 1881.

(Signed) WM. BUTLER. [L. S.]
W. McMURTRIE. [L. S.]

39 *Appendix.*

OFFICE WESTMORELAND BUILDINGS,
No. 230 SOUTH THIRD STREET,
PHILADELPHIA, *January 19th*, 1880.

Sold to Messrs. Peter Wright & Sons for account of Messrs. A. Norrington & Co., London:

Five thousand (5,000) tons old T iron rails for shipment from a European port or ports, *at the rate of about one thousand* (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45.00) per ton of 2,240 pounds, custom-house weight, ex.ship "Philadelphia."

Settlement cash on presentation of bills, accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to *replace* any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.

EDWARD J. ETTING,
Metal Broker.

Cablegram from A. Norrington & Co. to E. J. Etting, March 11th, 1880:

Seriasis 500 double heads Baltimore, Wright's contract.

(Translation.)

Ship at once 500 double heads Baltimore, Wright's contract.

40 Cablegram from E. J. Etting to A. Norrington & Co., March 15th, 1880:

Accidence Baltimore.

(Translation.)

Will not accept Baltimore.

Cablegram from E. J. Etting to A. Norrington & Co., Philadelphia, 13th April, 1880:

Noorphil, London:

Buyers contract January nineteenth offer Pediadis cash now to calabrian 3,800 tons balance contract.

(Translation.)

Buyers contract January nineteenth offer fifteen shillings cash now to cancel the order for 3,800 tons balance of contract.

Cablegram from A. Norrington & Co. to E. J. Etting, London, April 14th, 1880:

Impervious ustica sleeveless oblivion for pacedura.

(Repeated April 15th, 1880:)

Impervious ustica sleeveless oblivion for pacedura.

(Translation.)

It is impossible; 2,000 tons in course of shipment. How much can you obtain for old T iron rails?

41 Cablegram from E. J. Etting to A. Norrington & Co., April 15th, 1880:

Norrphil, London.

Brancard accidence moanfull than consectual quarrel. Occupancy pacedura.

(Translation.)

Buyers will not accept more than contract quantity. Can not obtain an offer old iron T rails.

Cablegram from A. Norrington & Co. to E. J. Etting, April 21st, 1880:

Have shipped further 550 double heads against Wright's contract. Would they like about 500 tons more same section, shipment about a fortnight? Cable selves and Kleinwort.

Cablegram from E. J. Etting to A. Norrington & Co., April 22d, 1880:

Paca wallow amusement rather postpone slayer.

(Translation.)

Old D. H. iron rails—do not want any more at present. Do not anticipate, rather postpone shipments.

Cablegram from E. J. Etting to A. Norrington & Co., dated 4th May, 1880:

Wright's scorning Paca.

(Translation.)

Wright's are satisfied with old double-head iron rails.

42 Cablegram from E. J. Etting to A. Norrington & Co., 8th May, 1880:

What rate per ton will you postpone shipments Wright's contract?

(This translates itself.)

Cablegram from A. Norrington & Co. to E. J. Etting, dated May 10th, 1880:

Wright's rails chalice peevishly postpone shipments.

(Translation.)

Wright's rails we have chartered. It is not in our power to postpone shipments.

PHILADELPHIA, *15th March*, 1880.

Messsss. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I to-day have advice from Messrs. A. Norrington & Co., London, of the shipment of one thousand eight hundred and sixty p's old T-rails, four hundred tons, per "Snap," for this port, letter dated March 2d, 1880, same being on account contract January 19th, 1880, five thousand tons. I am also in receipt of a cable from them, viz: "Respecting Baltimore, immediate reply required," same being in regard cable of 11th, viz: "Ship at once five hundred D H's Baltimore, Wright's contract."

Very truly yours, EDWARD J. ETTING.

43 PHILADELPHIA, *March 29th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I am in receipt of a letter, under date of March 18th, from Messrs. A. Norrington & Co., London, with the advice of the shipment of four hundred and fifty tons old double-head rails on vessel called "Hazelwood," from Aberdovey for this port, shipment being on account contract five thousand tons T.

Very truly, (Signed) EDWARD J. ETTING.

PHILADELPHIA, *April 6th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I am to-day in receipt of a letter from Messrs. A. Norrington & Co., London, under date of 24th March, with advice of shipment of four hundred and thirty-five tons old T rails, against your contract. Vessel's name the "Marianna IV.," sailing from Lisbon for this port.

Very truly, yours, (Signed) EDWARD J. ETTING.

PHILADELPHIA, *24th April*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I have just received following advices from
44 A. Norrington & Co., London, the following ships have been chartered against the contract, and the documents will come forward in due course.

	Tons.
Philip Fitzpatrick	141
Molilamo	80
Europa	150
Alfen	500
Holmestrand	550
Mariana, II	250
Making	1,671
Add to this quantity shipped	1,284
	2,955

Very truly, EDWARD J. ETTING.

PHILADELPHIA, *3rd May*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I am in receipt of advices from Messrs. Norrington & Co. of the shipment of 3,042 p'c's old rails (DHs.) 550 tons on account contract with you, shipped from Southampton to Philadelphia per "Columba Carolina," letter dated April 20th. Messrs. Norrington ask me if you are willing to receive on account of your rails double heads instead of T's when they can ship them. Please advise me so that I can cable them to-day.

(Signed) EDWARD J. ETTING.

PHILADELPHIA, *May 4th*, 1880.

Mr. EDWARD J. ETTING, *City*.

DEAR SIR: Your favor of the 3d received. We are much 45 obliged for the advice of shipments under our contract for rails with Messrs. Norrington & Co. of January 19th, 1880, which appear to be in order.

In answer to your question, whether we are willing to accept double-head rails under this contract instead of "Tees," we would say that same will be satisfactory to us, shipments to accord with contract quantity and time.

Yours, very truly,

(Signed) PETER WRIGHT & SONS.
Per THOS. BLAKEY.

PHILADELPHIA, *May 6th*, 1880.

Mr. E. J. ETTING, *City*.

DEAR SIR: Please obtain for us the dates of the B. L. for parcels of rails which have been advised under our contract with Messrs. Norrington & Co., of January 19th, 1880, and in future please give us this information at the time of advice of the vessels. We would also like to have at the time of advice the nationality and rig of the various vessels; also the port from whence they sail.

By giving us these points promptly, you will greatly oblige,

Yours, very truly,

(Signed) PETER WRIGHT & SONS.
Per THOS. BLAKEY.

PHILADELPHIA, 10*th May*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I to-day have advice from Messrs. Norrington & Co., under date of 27th and 29th of April, of shipments on account of your contract, viz:

"Mariana II," from Lisbon, 246-0-1-16 old T's.
"Holmestrand," " " 550-0-0-0 " "

Very truly,
(Signed) EDWARD J. ETTING.

46 PHILADELPHIA, *May* 14*th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: Referring to contract made through you with Messrs. A. Norrington & Co., London, for five thousand tons old rails, dated January 19th, 1880, we beg to notify you that we shall decline accepting the two cargoes of four hundred and fifty tons old rails ex. "Hazelwood" and four hundred and thirty-five tons old rails ex. "Marianna IV," shipped in March, and to also notify you that we shall decline receiving the shipments you have notified us as having been made in April, under said contract, neither of these monthly shipments being in accordance with said contract.

We are yours, very respectfully,
PETER WRIGHT & SONS.

PHILADELPHIA, 15*th May*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I am in receipt of your favor of the 14th inst., in which you say that "you beg to notify that you should decline accepting the two cargoes of four hundred and fifty T old rails ex. "Hazelwood," and four hundred and thirty-five T old rails ex. "Marienna IV."

In reply permit me to say that you have already accepted both of these cargoes, and it is too late for you now to decline doing so. In compliance with your letter of the 24th ult'o, the "Hazelwood" was directed to unload at the storage yard of J. W. Hoffman & Co., at Reed street, and as I am informed the rails have been already discharged as you directed. You also verbally requested that
the "Marienna IV" should proceed to the wharf at Girard
47 Point, and orders were given to that effect. You are,
no doubt, aware yourselves whether she has yet reached her
wharf and discharged her cargo. In view of these facts, I cannot but ask you to reconsider the determination expressed in your letter of yesterday. So far as I understand mercantile us*ua*ge, when these cargoes were tendered you, you did accept them, and thereby waived every objection, if any existed. I shall, therefore, request Messrs. S. & W. Welsh to make out the bills as before, and the same will be presented with C. H. certificate of weight according to the terms of the contract. Please let me know whether, in view of these facts, you will not honor the same on presentation.

Very truly, EDWARD J. ETTING.

PHILADELPHIA, *May 17th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: We have received yours of the 15th, but too late to reply to you that day.

We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article.

On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any 48 further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipment.

There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage.

We are yours, very respectfully,

PETER WRIGHT & SONS.

PHILADELPHIA, *May 18th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I received your favor of the 17th inst. yesterday afternoon. I regret that whether advised or not, that what has occurred did not amount to an acceptance of the iron under the terms of the contract, you do not agree with me in thinking that according to mercantile usage it did amount to an acceptance, and that as merchants you were bound to take and pay for the iron over which you had exercised control, and which has been unloaded in the yard designated by you, under your own orders. In respect to the objections that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, and expressly 49 stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month. Our understanding that a certain latitude in respect to the amount of the monthly shipments was thus secured, was confirmed by the fact that on the 13th April, after you knew what shipments had been made in February and March, you asked me to cable an offer "to cancel the order for three thousand eight hundred tons balance contract;" thus recognizing your liability to take that balance, and misleading Messrs. Norrington & Co. into continuing the April and May shipments after this offer had been declined. The latter part of April you requested me to obtain a postponement in the time of shipments, and I cabled for you to London, making that request, and as you have received advices of shipments from time to time you have always acknowledged the same to be in order.

In view of the constant intercourse between us, and your failure to express the slightest dissatisfaction as to the manner in which the shipments were being made, and the modifications which had been made in the contract, by substituting double-heads in place of T's—a change considerably to your advantage—your present determination is the more suprising. You expressed yourselves as satisfied with the March shipments by the "Hazelwood" and "Marianna IV," without making any objection to the shipment of only four hundred tons in February; and, as to April, while it seems to me "too plain to require any remark," I do not understand how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to
know definitely from you whether you intend to reject the
50 April shipments, and, if so, upon what ground, and also
whether you are decided to reject the remaining shipments
under the contract.

You say in your last paragraph that you shall avail yourselves of the advantage, if you are absolved from the contract; but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention. Meanwhile, as to the cargoes by the "Hazelwood" and "Marianna IV" I must undertake to negotiate a sale for your account and risk. If you have any suggestions as to the time, place, or manner of sale, I shall be glad to receive them. If you prefer it, I will have the iron sold at public auction; but my own judgment, as a broker, is that a better price can be obtained by private sale, and when I have secured a customer I will report to you. I shall be glad to receive any suggestion from you tending to reduce the damages that must be incurred, and for which, I am advised, you will be made legally liable.

Very truly, EDWARD J. ETTING.

PHILADELPHIA, *May 19th*, 1880.

Mr. E. J. ETTING, *Broker*, *Philadelphia*.

DEAR SIR: In reply to yours of 18th, we beg to say that we have no desire to make unnecessary difficulties. You are at liberty, therefore, to sell the iron for the account of Messrs. A. Norrington & Co., as you deem best for all concerned, and that if we are bound to accept or have as matter of law accepted so as to waive the failure to deliver, we will be deemed to be in the same position as if they had tendered complete performance, and we had refused to accept, *i. e.*, be liable for the differences, you giving us notice of intended sales as you suggest.

51 We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of about, it is settled as well as such a thing can be, and certainly, neither the February, March, or April shipments are within the limits.

As to our recognitions of the contract to which you refer, one act was a concession to your request, not a favor asked. The others were proposals to vary not acted on. But you will please remember that at the time these things happened we did not and could not know that the seller did not intend completing the shipments. Some of the iron sent was shipped from Portugal, and within a few days February shipments have arrived. How could we know that he did not expect to complete the shipments even for February.

However that may be, we certainly were debating whether this was or was not his intention till within a few days of this time, and saw no reason to assume the fact till we wrote.

As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract.

Our rights to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required.

You say that we expressed approval of the shipments as made. If you mean by that that we implied that we knew these 52 were all that were to be made, we refer to our letters, each of which went on receiving each separate notification. The future was not referred to nor thought of.

You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself.

You know quite as well as we do what is the rule and its uncertainty of application.

Nor do we think that the nicest sense of mercantile fairness demands more of us when you are seeking to compel performance of an oppressive contract for your principal's profit.

Yours, very respectfully,

PETER WRIGHT & SONS.

PHILADELPHIA, 21*st May*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I beg leave to notify you that I have received the following offers for the two cargoes of old rails shipped by Messrs. A. Norrington & Co., on account contract with you, January 19th, 1880, viz., "Hazelwood," four hundred and fifty tons double-heads;

Hoffman's store twenty-five dollars and fifty cents ($25.50) per ton prompt cash on delivery of custom-house certificate of weight. "Marianna IV," about four hundred and thirty-five tons T's, twenty-five dollars ($25.00) per ton, delivered at Philadelphia and Read-
53 ing Railroad wharf, prompt cash on delivery of custom-house certificate of weight. The latter lot I may have to pay lighterage on. I shall close unless you object to the sale and notify me immediately, as purchasers wish a reply to-day. Difference between price obtained and contract price with any expenses will be charged to you.

Very truly, yours, EDWARD J. ETTING.

PHILADELPHIA, *May 21st*, 1880.

Mr. E. J. ETTING, *Broker*, *Philadelphia*.

DEAR SIR: We are in receipt of yours of this date, and in reply would say that we shall make no objection to the proposed sale of which you notify us, but, of course, we deny that any liability exists for the differences and charges, as you seem to assume.

We are, yours, very respectfully,
PETER WRIGHT & SONS.

PHILADELPHIA, *4th June*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia*.

GENTLEMEN: I beg leave to advise you of the arrival of the "Mariana II," with 246-0-1-16 old iron T rails on account contract with A. Norrington & Co. Please send me instructions in regard to her.

Very truly, EDWARD J. ETTING.

54 PHILADELPHIA, *June 4th*, 1880.

Mr. E. J. ETTING, *Broker*, *Philadelphia*.

DEAR SIR: Your favor of this date received. In answer thereto we beg to say that the cargo of the "Marianna II," will not be accepted, the contract not having been complied with. To avoid unnecessary correspondence, we will add, if you wish our authority to deal with the cargo as you see best for the owner, without prejudice to his right to treat this as a tender and refusal, we give it to you now in advance.

Yours, respectfully, PETER WRIGHT & SONS.

PHILADELPHIA, *June 8th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia*.

GENTLEMEN: The "Columba Carolina" has arrived with five hundred and fifty tons old rails on account contract with A. Norrington & Co., January 19th, 1880. Please send me instructions in regard to her. I am advised of a further shipment of two hundred tons T rails per "Annie Marie," in letter from Messrs. A. Norrington & Co., under date of May 27th.

Very truly, EDWARD J. ETTING.

PHILADELPHIA, *June 9th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: In reply to yours of 8th, we beg to refer to ours of 4th, and request you to consider the contents as a reply to yours of 8th.

Yours, respectfully, PETER WRIGHT & SONS.

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55 PHILADELPHIA, *June 10th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I notified you in due course of the April shipments under your contract with Messrs. A. Norrington & Co., and now beg to inform you that two of the vessels, viz., the "Marianna II" and the "Columba Carolina," are in port ready to deliver their cargoes. As I have before said, I consider you are bound to accept the April shipments as being made in accordance with the terms of the contract, but understanding that you object, that the amount is in excess of what you ought to be required to take, I am willing to deliver one thousand tons strict measure on account of that month's shipments, and if you are prepared to take the cargoes now in port, with the understanding that when the other vessels arrive the amount of one thousand tons will be made up, I shall be glad to have you do so.

Of course, this offer is made without prejudice to my right to insist that the shipments are according to contract, or to make the other shipments with variation from the exact monthly figure, provided the whole five thousand tons are shipped within the six months. In case of your refusal to either accept all of the April shipments, or to take the one thousand tons strict measure out of that month's shipments, I propose, for the present, to store the iron, in the hope that the price will shortly advance. If you prefer it, however, I will have the iron immediately sold, so as to fix the measure of damages by the market price of to-day; but I think it will be to your advantage to have the sale delayed, and unless you send me notice of some objection on your part, I shall, as already notified, hold it for at least a few weeks, in the hope that I may secure a better market.

56 Before selling I shall notify you of the time and place, and I intend to reserve the right of making sale for your account and risk at any time hereafter that it may become in my judgment desirable to do so. An early reply upon both points will oblige,

Yours, truly, EDWARD J. ETTING.

PHILADELPHIA, *June 11th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: We do not think the plan proposed in your letter of the 10th inst. will be a compliance with the contract.

Messrs. Norrington & Co. were bound to ship one thousand tons per month, and notify us of vessels. They shipped and notified us of about sixteen hundred tons. They do not comply with their contract by now selecting portions of those shipments and delivering them. At least this is our notion of the rules on this subject, and we decline accepting proposed deliveries.

With regard to your proposal to store in hopes of a rise which will enure to your benefit or ours, as it may turn out, one or the other is mistaken in his notion as to the contract and the obligations under it; we think your plan is a good one.

Of course we both understand if we are not bound to accept the tender as made, you act for Norrington & Co., and if we are bound, you act for us in regard to the future disposition of the iron.

Yours, respectfully,

PETER WRIGHT & SONS.

57 PHILADELPHIA, *June 11th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: The "Holmestrand" has arrived, with five hundred and fifty tons old iron tee-rails, in account contract with A. Norrington & Co., January 19th, 1880. Please send me instructions in regard to her.

Very truly, EDWARD J. ETTING.

PHILADELPHIA, *June 12th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: In reply to yours of the 11th inst., we beg to refer to ours of the 4th, and request you to consider the contents as a reply to yours of the 11th.

Yours respectfully, PETER WRIGHT & SONS.

PHILADELPHIA, *June 12th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: Yours of 11th inst. received, and contents noted.

I beg leave to say that the shipments for April account, your cantract with A. Norrington & Co., were thirteen hundred and forty-six tons, and not sixteen hundred, as per your letter.

Very truly yours, EDWARD J. ETTING.

58 PHILADELPHIA, *June 14th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: We are in receipt of yours of 12th inst., and in reply would say the "sixteen hundred" was used as a round number, the footing up being accurately one thousand five hundred and ninety-six tons, but by a mistake we included a two hundred and fifty ton cargo, so that it should have been one thousand three hundred and forty-six on that count. In reality, however, it should be one thousand four hundred and twenty-six, but for the purpose of the notice this is immaterial, the point being that more than one thousand tons were notified.

Your, respectfully, PETER WRIGHT & SONS.

PHILADELPHIA, *June 15th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I am in receipt of yours of 14th inst. Referring to my letter of April 28th, would say that the following vessels were notified to you in error, not being intended against your contract by Messrs. A. Norrington & Co., viz:

Philip Fitzpatrick	141 tons.
Molilamo	80 "
Europa	150 "
Alfen	500 "

I beg now to notify you that about nine hundred tons of
59 old rails have been shipped by the "Winifred," on account of
May shipments, against your contract with Messrs. A. Norrington & Co., of January 19th, 1880.

Very truly, yours, EDWARD J. ETTING.

PHILADELPHIA, *June 15th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: In answer to your favor of this date we would say that we think the notification as to April shipments cannot be corrected at this late date, nor can we agree that it was not intentional, the terms of the contract having long since been broken.

As to thes hipment per "Winifred" we cannot accept this as a notice, except it shall turn out to have been duly given according to terms of contract, and if the contract is not wholly at an end by reason of the previous defaults of the seller.

Yours respectfully, PETER WRIGHT & SONS.

PHILADELPHIA, *7th July*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I am in receipt of advices from Messrs. A. Norrington & Co., under date of June 24th, of the following shipments on account of your contract with them, viz:

"Anna and Maria," from Hamburg, tons 199-19-3-6, old iron T rails, B. L. dated May 22d, 1880.

"Winnifred," from Lisbon, tons 900-0-0-0, old iron T rails, B. L. dated May 20th and 28th, 1880.

Very truly, (Signed) EDWARD J. ETTING.

60 PHILADELPHIA, *July 8th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: Yours of yesterday received. In answer, we would say that we have already written you fully declining to receive the parcels of rails per the "Anna and Maria" and "Winnifred," which we now confirm.

Yours truly,
(Signed) PETER WRIGHT & SONS.

PHILADELPHIA, *July 10th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: I am in receipt of advices from Messrs. A. Norrington & Co., under date of June 29th, 1880, of the following shipments on account of your contract with them, viz:

"Nimbus," from Bremen, five hundred tons old iron T rails.

"Ranger," from Antwerp, five hundred tons old iron T rails.

Also, that they have chartered the "Iedanesti Dubrovacki" to load three hundred tons old T rails, which will complete deliveries against your contract. This vessel will load at Lisbon.

Very truly,

(Signed) EDWARD J. ETTING.

PHILADELPHIA, *July 12th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: We have yours of 10th inst. Assuming that there is
any contract existing between Messrs. Norrington and our-
61 selves, we must take exception to the notification, as you do
not mention the date of the shipments by the vessels you
have named.

Yours truly,

(Signed) PETER WRIGHT & SONS.

PHILADELPHIA, *July 13th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: In reply to yours of the 12, would say that the bill of lading of the "Nimbus" is $\frac{6}{5}$ from Bremen; papers of the "Ranger" not yet received.

Very truly yours, (Signed) EDWARD J. ETTING.

PHILADELPHIA, *July 14th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: The "Winnifred" has arrived with 900 tons old iron Tee rails on account contract with Messrs. A. Norrington & Co., January 19th, 1880.

Please send me instructions in regard to her.

Very truly (Signed) EDWARD J. ETTING.

PHILADELPHIA, *July 15th*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: Yours of the 13th and 14th inst's received. We beg to say that the parcels therein advised are declined by us.

Yours, very truly, PETER WRIGHT & SONS.

62 PHILADELPHIA, *19th July*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: Referring to my letter of 10th inst., and yours of the 12th do., would say I have received advices from Messrs. A. Norrington & Co. of shipment of tons 499-10-0-17 per "Ranger," bill lading June 26th, from Antwerp, against June shipments of your contract with them January 19th, 1880.

Very truly, (Signed) EDWARD J. JETTING.

PHILADELPHIA, *July 21st*, 1880.

Mr. E. J. ETTING, *Broker, Philadeḷphia, Pa.*

DEAR SIR: We are in receipt of yours of the 19th inst., and in reply would say that we have previously informed you that we do not consider there is any contract existing between Messrs. Norrington & Co. and ourselves on the subject of this iron.

We remain, yours truly, PETER WRIGHT & SONS.

PHILADELPHIA, *July 27th*, 1880.

Messrs. PETER WRIGHT & SONS.

GENTLEMEN: I have received advice from Messrs. A. Norrington & Co. of shipment of fifteen hundred and eighteen pieces—three hundred tons old iron T-rails, per "Iedanesti Dubrovacki,"
63 bill of lading July 8th, 1880, from Lisbon. Account your contract with them January 19th, 1880. This completes shipments against the contract.

Very truly, yours, (Signed) EDWARD J. ETTING.

PHILADELPHIA, *July 28th*, 1880.

Mr. E. J. ETTING, *Broker.*

DEAR SIR: We are in receipt of yours of 27th inst., and in reply would say that we have previously informed you that we do not consider there is any contract existing between Messrs. Norrington & Co. and ourselves on the subject of this iron. We remain,

Yours, truly, (Signed) PETER WRIGHT & SON.

PHILADELPHIA, *July 30th* 1880.

Messrs. PETER WRIGHT & SONS.

GENTLEMEN: The "Nimbus" has arrived with five hundred tons old iron T-rails on account of your contract with Messrs. A. Norrington & Co., as per my letters of July 10th and 13th, 1880.

Please send me instructions in regard to her.

Very truly, yours,

(Signed) EDWARD J. ETTING.

PHILADELPHIA, *August 2d*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: We are in receipt of yours of the 30th ult., and
64 in reply would say that we have previously informed you that we do not consider there is any contract existing between Messrs. Norrington & Co. and ourselves on the subject of this iron.

We remain, yours, truly,

(Signed) PETER WRIGHT & SONS.

PHILADELPHIA, *4th August*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: The "Annie Marie" has arrived with one hundred and ninety-nine tons of old iron T rails, on account your contract with Messrs. A. Norrington & Co., as per my letter of July 7th, 1880. Please send me instructions in regard to her.

Very truly, EDWARD J. ETTING.

PHILADELPHIA, *5th August*, 1880.

Mr. E. J. ETTING, *Broker, Philadelphia.*

DEAR SIR: We are in receipt of yours of 4th inst., and in reply would say that we have previously informed you that we do not consider there is any contract existing between Messrs. Norrington & Co. and ourselves on the subject of this iron.

We remain, yours truly,
(Signed) PETER WRIGHT & SONS.

65 PHILADELPHIA, *August 28th*, 1880.

Messrs. PETER WRIGHT & SONS, *Philadelphia.*

GENTLEMEN: The "Iedanesti Dubrovacki" has arrived with three hundred tons old iron T rails, on account your contract of January 19th, 1880, with Messrs. A. Norrington & Co., as per my letter of 27th ult. Please send me instructions in regard to her.

Very truly yours,
EDWARD J. ETTING,
Per G. H. MACFARLAND.

Ex "Hazelwood."

PHILADELPHIA, *May 17th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$456\frac{215}{2240}$ tons old iron rails as per contract of January 19th, 1880.
$456\frac{215}{2240}$ tons @ $45 ------------------------------ $20,524 32

Certificate sent with Atkin's bill to Etting.

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight

Arrived April 23d, 1880. E. Z.

Ex. "Mariana IV."

PHILADELPHIA, *June 8th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$441\frac{480}{2240}$ tons old "T" rails, as per contract of January 19th, 1880.
$441\frac{480}{2240}$ tons @ $45 -------------------------- $19,854 64

Certificates sent to purchasers (Atkins Bros.)

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived May 8th, 1880. E. Z.

66 Ex. "Columba Carolina."

PHILADELPHIA, *June 23d*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$550\frac{740}{2240}$ tons old iron "T" rails, as per contract of January 19th, 1880.

$550\frac{740}{2240}$ tons @ $45 .... $24,764 87

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived June 8th, 1880. E. Z.

Ex. "Marianna II."

PHILADELPHIA, *June 25th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$245\frac{220}{2240}$ tons old iron "T" rails, per contract of January 19th, 1880.

$245\frac{220}{2240}$ tons @ $45 .... $11,029 42

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived June 21st, 1880. E. Z.

Ex. "Holmestrand."

PHILADELPHIA, *June 28th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$554\frac{295}{2240}$ tons old iron "T" rails, as per contract of January 19th, 1880.

$554\frac{295}{2240}$ tons @ $45 .... $24,935 93

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived June 9th, 1880. E. Z.

67 Ex. "Winnifred."

PHILADELPHIA, *August 11th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$889\frac{1895}{2240}$ tons old iron "T" rails, as per contract of January 19th, 1880.

$889\frac{1895}{2240}$ tons @ $45 .... $40,043 07

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived July 14th, 1880. E. Z.

Ex. "Nimbus."

PHILADELPHIA, *August 24th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$496\frac{1110}{2240}$ tons old iron "T" rails, as per contract of 19th January, 1880.

$496\frac{1110}{2240}$ tons @ $45 .... $22,342 30

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived July 30th, 1880. E. Z.

Ex. "Anna and Marie."

PHILADELPHIA, *August 25th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$199\frac{2110}{2240}$ tons old iron "T" rails, as per contract of January 19th, 1880.

$199\frac{2110}{2240}$ tons @ $45 ------------------------ $8,997 39

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived August 3d, 1880. E. Z.

68 Ex. "J. Dubrovacki."

PHILADELPHIA, *September 9th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$306\frac{1375}{2240}$ tons old iron "T" rails, as per contract of January 19th, 1880.

$306\frac{1375}{2240}$ tons @ $45 ------------------- $13,797 62

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived August 28th, 1880. E. Z.

Ex. "Ranger."

PHILADELPHIA, *September 18th*, 1880.

Messrs. Peter Wright & Sons bought of A. Norrington & Co., per E. J. Etting, broker.

$495\frac{1395}{2240}$ tons of old "T" rails, as per contract of January 19th, 1880.

$495\frac{1395}{2240}$ tons @ $45------------------- $22,303 02

Terms.—Cash on presentation of bill accompanied by custom-house certificate of weight.

Arrived September 2d, 1880. E. Z.

Cat. No. 957½.

Certificate of Total Weights.

Weights of old iron rails imported by S. & W. Welsh, in the bark "Hazelwood," from Aberdovey, arrived April 23d, 1880:

Articles.	Marks.	Gross.	Tare.	Net.
Quantity old iron rails				1,021,655

69 CUSTOM-HOUSE, PORT OF PHILADELPHIA,
SURVEYOR'S OFFICE, *May 17th*, 1880.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

E. O. GOODRICH, *Surveyor*.

Custom-house fees paid May 17th, 1880. G. W. Silvis, cashier.
Naval office, port of Philadelphia, May 17th, 1880.

Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the bark "Mariana 4th," from Lisbon, arrived May 8th, 1880:

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity old railroad iron			988,320

CUSTOM-HOUSE, PORT OF PHILADELPHIA,
SURVEYOR'S OFFICE, *June 9th*, 1880.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

E. O. GOODRICH, *Surveyor*.

Custom-house fees paid June 9th, 1880. G. W. Silvis, cashier.
Naval office, port of Philadelphia, June 9th, 1880.

70 Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the bark "Colomba Carolina," from Southampton, arrived June 8th, 1880:

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity old iron rails			1,232,740
			Tons. 550.6.2.12		

CUSTOM-HOUSE, PORT OF PHILADELPHIA,
SURVEYOR'S OFFICE, *June 25th*, 1880.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

H. P. GOODRICH,
Deputy Surveyor.

Custom-house fees paid June 25th, 1880. G. W. Silvis, cashier.
Naval office, port of Philadelphia, June 25th, 1880.

Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the brig "Marianna 2d," from Lisbon, arrived June 2d, 1880:

71

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity old iron rails			549,020
			245.1.3.24		

Cwt.
18.1.20 loss.

Wharfage.

CUSTOM-HOUSE, PORT OF PHILADELPHIA,
SURVEYOR'S OFFICE, *June 19th*, 1880.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

H. P. GOODRICH,
Deputy Surveyor.

Custom-house fees paid June 21st, 1880. G. W. Silvis, cashier.
Naval office, port of Philadelphia, June 21st, 1880.

Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the bark "Holmstrand," from Liverpool, arrived June 9th, 1880:

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity iron rails			1,241,255

CUSTOM-HOUSE, PORT OF PHILADELPHIA,
SURVEYOR'S OFFICE, *June 21st*, 1881.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

H. P. GOODRICH,
Deputy Surveyor.

72 Custom-house fees paid June 21st, 1881. S. S. Hartranft, cashier.
Naval office, port of Philadelphia, June 21st, 1881.

Cat. No. 957½.

Certificates of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the ship "Winifred," from Lisbon, arrived July 13th, 1880:

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity old iron rails			1,993,255

Custom-House, Port of Philadelphia,
Surveyor's Office, *June 21st*, 1881.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

H. P. GOODRICH,
Deputy Surveyor.

Custom-house fees paid June 21st, 1881. S. S. Hartranft, cashier.
Naval office, port of Philadelphia, June 21st, 1881.

Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the bark "Nimbus," from Bremen, arrived July 30th, 1880:

73

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
White.		Q'ty old iron rails------	1,303,630	191,480	1,112,150

Custom-House, Port of Philadelphia,
Surveyor's Office, *June 21st*, 1881.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

H. P. GOODRICH,
Deputy Surveyor.

Custom-house fees paid June 21st, 1881. S. S. Hartranft, cashier.
Naval office, port of Philadelphia, June 21st, 1881.

Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the bark "Anna Marie," from Hamburg, arrived August 3d, 1880:

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity old iron rails------------------------			447,870

Custom-House, Port of Philadelphia,
Surveyor's Office, *June 21st*, 1881.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

H. P. GOODRICH,
Deputy Surveyor.

74 Custom-house fees paid, June 21st, 1881. S. S. Hartranft, cashier.
Naval office, port of Philadelphia, June 21st, 1881.

Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the bark "Jedaneste Dubrovacki," from Lisbon, arrived August 28th, 1880:

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity old iron rails			686,815

Custom-House, Port of Philadelphia,
Surveyor's Office, *Sept. 9th*, 1880.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

E. O. GOODRICH, *Surveyor.*
Pr. J. K. H.

Custom-house fees paid, September 9th, 1880. G. W. Silvis, cashier.

Naval office, port of Philadelphia, September 9th, 1880.

Cat. No. 957½.

Certificate of Total Weights.

Weights of merchandise imported by S. & W. Welsh, in the bark "Ranger," from Antwerp, arrived September 2d, 1880.

75

Marks.	Nos.	Articles.	Gross Weight.	Tare.	Net Weight.
		Quantity old iron rails			1,110,195

Custom-House, Port of Philadelphia,
Surveyor's Office, *June 21st* 1881.

I certify that the foregoing is a correct transcript of the weigher's dock-book on file in this office.

H. P. GOODRICH,
Deputy Surveyor.

Custom-house fees paid, June 21st, 1880. S. S. Hartranft, cashier.

Naval office, port of Philadelphia, June 21st, 1881.

A. Norrington & Co.,
iron and metal merchants,
11 St. Helen's Place,
Bishopsgate street, E. C.

One hundred pounds advanced on freight.

Shipped in good order and condition, by A. Norrington & Co., of London, in and upon the good ship or vessel called the "Winnifred," whereof Nickerson is master for this present voyage, and now lying in the port of Lisbon and bound for Philadelphia, say one thousand eight hundred and thirty-seven pieces of old iron Tee rails, weighing four hundred and six thousand kilogrammes, being marked and numbered as per margin; and to be delivered in the like good order and condition at the aforesaid port of Philadelphia (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order or to ——— assigns; he or they paying freight for the said ——— at the rate of and all other conditions as per charter party.

In witness whereof, the master or purser of the said ship or vessel has affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the rest stand void.

Dated at Lisbon, this twenty-eighth day of May, 1880. Weight and quality unknown. A number of pieces in dispute. All on board to be delivered.

J. NICKERSON.

Interest and insurance paid.

J. NICKERSON.

The goods to be discharged within —working days, or demurrage to be paid by consignees at the rate of — per day.

76 CARL PRIOR, Bremen and Bremerhafen, forwarding agent.

MARK—A stripe of white color.

Length and weight unknown. Not accountable for breakage and rust.

Shipped in good order and well conditioned, by Carl Prior, on board the British vessel called the "Nimbus," whereof is master for the present voyage Coffill, and now lying in the river Weser, and bound for Philadelphia, (2,618) two thousand six hundred and eighteen old rails, weighing five hundred and seven thousand five hundred kilogrammes, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Philadelphia (the dangers and accidents of the seas excepted) unto order or to assigns, he or they paying freight for the said goods. Freight paid in Bremen.

In witness whereof, the master or purser of the said vessel has affirmed to three bills of lading, all of this tenor and date; the one of which being accomplished, the others to stand void.

Dated in Bremen, the fifth day of June, 1880.

L. M. COFFILL.

A NORRINGTON & Co., iron and metal merchants.
II St. Helen's Place,

Shipped in good order and condition, by A. Norrington & Co., London, in and upon the good ship or vessel called the "Jadenesti Dubrovacki," whereof Knesevic is mas-

Bishopsgate street, E. C.

Cargo to be taken from alongside as fast as vessel can deliver.

The goods to be discharged within working days, or demurrage to be paid by consignees at the rate of per day.

ter for this present voyage, and now lying in the port of Lisbon and bound for Philadelphia, say (1518) one thousand five hundred and eighteen pieces of old flange iron rails, weighing three hundred and four thousand five hundred kilogrammes, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Philadelphia (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order or to its assigns, he or they paying freight for the said —— at the rate of one dollar and a half per ton and five per cent. primage.

In witness whereof, the master or purser of the said ship or vessel has affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the rest stand void.

Dated at Lisbon, this eighth day of July, 1880. Weight and quality unknown.

KNESEVIC.

77 A. NORRINGTON & Co., iron and metal merchants,
11 St. Helen's Place, Bishopsgate street, E. C.

Three thousand and twelve pieces.

Eight days remaining for discharging at Philadelphia.

Two hundred dollars United States gold, drawn on account of freight.

Interest and insurance paid.

H. JACOBSEN.

Shipped in good order and condition, by A. Norrington & Co., of London, in and upon the good ship or vessel called the "Holmstrand," whereof H. Jacobsen is master for this present voyage, and now lying in the part of river Tagus, and bound for Philadelphia, say three thousand and twelve pieces of old iron rails, weighing (558,250) five hundred and fifty-eight thousand two hundred and fifty kilogrammes, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Philadelphia (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order —— or to —— assigns; he or they paying freight for the said —— at the rate of and all other conditions as per charter party, dated 22d March, 1880.

In witness whereof, the master or purser of the said ship or vessel has affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the rest stand void.

Dated at Lisbon this twenty-first day of April, 1880. Fifty-eight pieces in dispute, if on board, to be delivered. Weight and quality unknown.

H. JACOBSEN.

Other conditions as per charter party.

Six days left for discharging, including Sunday.

Received on account of freight, one hundred pounds.

C. CICHERO.

Shipped in good order and well conditioned, by George Cohen & Co., in and upon the good ship called the "Columba Carolina," whereof is master for this present voyage C. Cichero, and now riding at anchor in Southampton, and bound for Philadelphia, with five hundred and fifty tons old iron rails, being three thousand and forty-two pieces, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Philadelphia. The act of God, the Queen's enemies, fire, all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever, save risk of boats so far as ships are liable thereto excepted, unto order or to assigns on paying freight for the said goods at the rate of 12 | 6 per ton of twenty hundred weight delivered, and five guineas gratuity, with primage and average accustomed.

In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.

Dated in Southampton, sixteenth day of April, 1880. Captain to sign for number of pieces. Weight unknown.

C. CICHERO.

78 SOUTHAMPTON, *16th April*, 1880.

Received of A. Haddon, Esq., the sum of seven pounds seven shillings gratuity on cargo of rails, supplied per "Colomba Carolina."

£7. 7. 0. C. CICHERO.

AUGUSTE ANDRE,
Antwerp.

Shipped in good order and well conditioned by Auguste André in and upon the good ship or vessel called the "Ranger," whereof is master for this present voyage Smith, and now lying in this port and bound for Philadelphia, two thousand seven hundred eighty-six old iron tee rails, weighing together five hundred seven thousand five hundred kilograms, being marked and numbered as in the margin, and to be delivered in the like good order and condition at the aforesaid port of Philadelphia (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and steam navigation of what nature or kind soever excepted) unto order, or to his or their assigns, he or they paying freight on the said goods. Paid in Antwerp with primage and average accustomed and disbursements as in the margin.

In witness whereof, the master of the said ship hath affirmed to four bills of lading, all of this tenor and date, the one of which being accomplished, the others to be void.

Weight, number, and specification unknown.

The goods to be received as fast as the captain can deliver them in accordance with the custom of port.

Dated in Antwerp, 26th of June, 1880.

E. C. SMITH.

Erasures approved.

E. C. SMITH.

Shipped in good order and well conditioned by Robert S. Carr, in and upon the good ship called the "Anna and Marie," whereof is master for this present voyage Bartels, and now riding at anchor in the port of Hamburg, and bound for Philadelphia, thirteen hundred and one old iron T rails, weighing 199.99 tons (one hundred and ninety-nine and ninety-nine one hundredths tons), being marked and numbered as in the margin, and to be delivered in the like good order and well conditioned at the aforesaid port of Philadelphia (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted), unto order or to assigns, he or they paying freight for the said goods £100 (one hundred pounds British sterling, in full), and other conditions as per charter party. Primage and average accustomed.

In witness whereof, the master or purser of the said ship have affirmed to three bills of lading, all of this tenor and date, the one of which being accomplished, the others to stand void. Dated in Hamburg, the 22d May, 1880.

Dem Capitain ist Inhalt, Maass und Gewicht unbekannt und ist derselbe nicht verantwortlich fiv Beschädigung, Bruch Leekage, Verderb, Rost u. Rattenfrass.

BARTELS.

79 Shipped in good order and well conditioned by A. Norrington & Co., in and upon the good ship called the "Marianna IV," whereof ——— is master for this present voyage, and now lying in the river Tagus, and bound for Philadelphia, (2,245)

two thousand two hundred and forty-five pieces of old railway iron, "bullheads," weighing (327,680) three hundred and twenty-seven thousand six hundred and eighty kilogrammes, and (562) five hundred and sixty-two pieces "vignoles," weighing (113,640) one hundred and thirteen thousand six hundred and forty kilogrammes, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Philadelphia (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted), unto order, or to ——— assigns ——— freight for the said goods and all other conditions as per charter party, with ——— primage and average accustomed.

In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void.

J. J. De CARVALHO.

Dated in Lisbon, 18th March, 1880.
Weight unknown.

	T.	c.	qr.
Old D. H. iron rails	45	0	0

Received on account of freight £112 0 0, less insurance of 2½ per cent.

Eight days, Sundays excepted, unexpired for discharging.

Shipped in good order and well conditioned by A. Norrington & Co., in and upon the good ship called the "Hazlewood," whereof William Daniel is master for this present voyage, and now lying in the port of Aberdovey, and bound for Philadelphia, two thousand two hundred and eighty pieces (or about) old D. H. iron rails, weighing four hundred and fifty tons, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of Philadelphia (the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted) unto order or to — assigns, freight for the said goods as per charter party, and forty-five pounds for going to Philadelphia as agreed, with primage and average accustomed.

In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading all of this tenor and date; the one of which being accomplished, the other two stand void.

Dated in Aberdovey, March 16th, 1880.
Weight and quality unknown.

WILLIAM DANIEL.

80 Seven days remain for dis-

Shipped in good order and well conditioned, by A. Norrington & Co., in and upon charging at Philadelphia.

the good ship called the "Snap," whereof K. Knudsen is master for this present voyage, and now lying in the river Tagus, and bound for Philadelphia, one thousand eight hundred and sixty pieces of old railway iron, weighing (406,000) four hundred and six thousand kilogrammes, being marked and numbered as in the margin, and to be delivered in the like good order and well conditioned at the aforesaid port of Philadelphia (the acts of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto order or to —— assigns, —— freight for the said goods and all other conditions as per charter party, with primage and average accustomed.

In witness whereof, the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date; the one of which bills being accomplished, the others to stand void.

Dated in Lisbon, 24th February, 1880. Twelve pieces in dispute, same to be delivered if on board. Not accountable for weight or damages.

K. KNUDSEN.

Shipped in good order and condition, by A. Norrington & Co., in and upon the good ship called the "Marianno II," whereof —— is master for the present voyage, now lying in the river Tagus, and bound for Philadelphia, (1,144) one thousand one hundred and forty-four pieces old railway iron, weighing (249,710) two hundred and forty-nine thousand seven hundred and ten kilogrammes, being marked and numbered as in the margin; to be delivered in like order and condition at the port of Philadelphia, (the dangers of the seas only excepted) unto order or to assigns, he or they paying freight for the said goods, and all other conditions as per charter party, with —— primage and average accustomed.

In witness whereof, the master or purser of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Lisbon, this tenth day of April, 1880. Weight unknown.

(Signed) T. F. LYUS.

81 (Endorsed:) No. 61. April sessions, 1881. In the circuit court of the United States, eastern district of Penna. A. Norrington & Co. *vs.* Peter Wright & Sons. Bill of Exceptions. Filed November 9, 1880.

82 And afterwards, to wit, on the 25th day of November, A. D. 1881, the plaintiff, by his attorney, comes into our said court here and presents his bond *sur* writ of error, and the same having been approved, is as follows, to wit:

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

ARTHUR NORRINGTON, a subject of the Kingdom of Great Britain, trading as A. Norrington and Company, *vs.* JAMES A. WRIGHT, CLEMENT A. GRISCOM, and FRANK S. NEALL, citizens of the State of Pennsylvania, trading as Peter Wright and Sons.	No. 61. April Sess., 1881.

Know all men by these presents, that the Philadelphia Trust Safe Deposit and Insurance Company is held and firmly bound unto the above-named James A. Wright, Clement A. Griscom, and Frank S. Neall, trading as Peter Wright and Sons, their certain 83 attorney, executors, administrators, or assigns, in the sum of five hundred dollars, to which payment, well and truly to be made, it does hereby bind itself and its successors. Sealed with the seal of the said The Philadelphia Trust Safe Deposit and Insurance Company, attested by the signatures of its president and secretary, this twenty-fifth day of November, A. D. 1881.

Whereas lately, at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between Arthur Norrington, trading as A. Norrington and Company, and James A. Wright, Clement A. Griscom, and Frank S. Neall, trading as Peter Wright and Sons, judgment was entered against the said Arthur Norrington, trading as aforesaid, and the said plaintiff having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit:

Now the condition of the above obligation is such, that if 84 the said Arthur Norrington, trading as aforesaid, shall prosecute his writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PHILADELPHIA TRUST, SAFE DEPOSIT AND
INSURANCE COMPANY.
J. L. ERRINGER, *Pres't.*

Attest: W. L. DuBOIS, *Secretary.* [SEAL.]

Signed and sealed in presence of—
RICHARD C. DALE.
SAMUEL BELL.

(Endorsed:) No. 61. April sess., 1881. C. C. U. S., E. D. of Pa. Norrington *vs.* Wright *et al.* Bond *sur* writ of error. Filed November 25, 1881.

85 UNITED STATES OF AMERICA, } *sct.*:
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in the case of Norrington *vs.* Wright *et al.*, No. 61, April sess., 1881, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this seventh day of December, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of these United States the one hundred and sixth.

[SEAL.] SAMUEL BELL, *Clerk of C. C.*

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 176. Arthur Norrington, trading as A. Norrington & Company, plaintiffs in error, *vs.* James A. Wright, Clement A. Griscom & Frank L. Neal, trading as Peter Wright & Sons. Filed 8th December, 1881.

IN THE SUPREME COURT OF THE UNITED STATES.

October, 1884.

Norrington
v.
Wright. } No. 176.

It is agreed that the copies of the documents hereto annexed shall be deemed and taken to have been tacked to the bill of exceptions and this agreement filed in the Court, and printed copies furnished as part of the record.

(1.) A letter from defendants to E. J. Etting, the plaintiff's agent, dated April 20, 1880, which is the letter referred to in the letter of May 15, on page 46 of the record, from E. J. Etting to defendants.

(2.) A memorandum of the dates of the shipments made by the plaintiff, so far as was known to his agent, Mr. Etting, at the time he furnished the same. This document was furnished in reply to the request in the defendants' letter to Etting, dated May 6, 1880, page 45 of the record. This is the memorandum referred to by F. L. Neall, on page 28 of record, in these words: *We first ascertained that date on the receipt of a memorandum from Mr. Etting, &c.*

Oct. 25, 1884.

SAM'L DICKSON,
For Pl'ff in Error.
R. C. McMURTRIE,
For Def'd't in Error.

Philad'a, *April* 24, '80.

Mr. E. J. Etting, *City.*

Dear Sir: Please have the 450 tons old rails per "Hazlewood," which are to be delivered to us, under contract with Messrs. A. Norrington & Co., discharged at the storage yard of Messrs. J. W. Hoffman & Co., at Reed St.

Oblige yours truly, PETER WRIGHT & SONS,
Per THOS. BLAKEY.

Invoice dated—

		T.	cwt.	qr.	lb.	
March 2.	Snap, from Lisbon	400	00	0	00	Feb. 24.
March 18.	Hazlewood, from Aberdovey	450	00	0	00	M'c'h 16.
March 25.	Marianna IV, from Lisbon	434	15	3	23	M'c'h 18.
April 20.	Columba Carolina, from Southampton	550	00	0	00	Apr. 16.
April 27.	Marianna II, from Lisbon	246	00	1	16	Apr. 20.
April 29.	Holmstrand, from Lisbon	550	00	0	00	Apr. 21.
		2,630	16	1	11	

Insp. 24 Feb'y.

October 25, 1884.

SAM'L DICKSON,
For Plaintiff in Error.
R. C. McMURTRIE.

[Endorsed:] Supreme Court U. S. 1884. October term. No. 176. A. Norrington & Co., pl'ff in error, *vs.* Jas. A. Wright *et al.* Stipulation of counsel & addition to record. Office Supreme Court U. S. Filed Oct. 28, 1884. James H. McKenney, clerk.

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DEC 20 1884

No. 176. *October Sessions, 1884.*

In the Supreme Court of the United States.

Arthur Norrington, trading as A. Norrington & Co., Plaintiff in Error,

vs.

James A. Wright et al., Defendants in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF. OF ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

SAM'L DICKSON,
J. C. BULLITT,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

Supreme Court of United States.

Arthur Norrington, trading as A. Norrington & Co., Plaintiff in Error,

vs.

James A. Wright et al., *Defendants in Error.*

October Sessions, 1884.

No. 176.

In Error to Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action to recover damages for the refusal of the defendants to receive and pay for forty-six hundred tons of old rails, in compliance with the contract, of which a copy is printed at page 20 of the Record. The sale was negotiated in Philadelphia, where the defendants are engaged in business as importing and shipping merchants, by the broker of the plaintiff, who resides in London. The bought and sold note was as follows:—

Philadelphia, January 19th, 1880.

"Sold to Messrs. Peter Wright & Sons, for account of Messrs. A. Norrington & Co., London, five thousand (5000) tons old T iron rails for shipment from a European port or ports, at the rate of about one thousand (1000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1st, 1880, at forty-five dollars ($45) per ton of twenty-two hundred and forty pounds custom-house weight, ex ship 'Philadelphia.' Settlement cash on presentation of bills accompanied by custom-house certificate of vessels' weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled *to replace* any parcel lost after shipment. Sellers, when possible, to secure to buyers, right to name discharging berth of vessels at Philadelphia."

Under this contract the plaintiff was at liberty to tender rails shipped by sailing vessels from any European port, and, in fact, shipments were made from Hamburg, Bremen, Antwerp, Aberdovey, Southampton, Lisbon, and other ports. It is apparent, therefore, that regularity of delivery was not deemed of importance, as the cargoes might have been sent from any port from the Baltic to the Black Sea, and the time of crossing might have varied from three weeks to four or five months. The rate of shipment was to be "about one thousand tons per month," but the whole contract was to be shipped within six months; and the entirety of the delivery was of so little consequence that the sellers were not to be compelled to replace any parcel lost after shipment. The reasonable explanation of this latitude in performance is found in the condition of things in January, 1880, when the whole world was scoured for old iron to supply the extraordinary demand which had sprung up in this country, and in the fact, perfectly well known to the defendants, that the rails to be shipped under this contract would have to be picked up in odd lots, wherever they could be found from one end of Europe to the other, and shipped from ports where promptness and dispatch could not be counted on. The natural meaning of the contract, therefore, is that the plaintiffs were to ship the iron as early as possible, "at the rate of about 1000 tons per month"; but if the peculiar circumstances of the times rendered it impossible to comply exactly with this stipulation, an extra month should be allowed in which to complete the shipments. The subsequent conduct of the defendants confirms this view. Only 400 tons were shipped in February, and 897 tons in March. The February shipment arrived, was delivered and paid for; and upon April 24th (page of Record), the defendants gave instructions as to the disposition of the cargo of the "Hazelwood," shipped in March, as advised by the letter of March 29th (page 22 of

Record). Meanwhile, the market had begun to rapidly decline, and in May, about the time of the arrival of the March cargoes, the defendants began to make inquiry as to the dates of shipment, and when informed as to the amounts shipped in February, March, and April, they declined to accept the shipments made in March and April (page 24). The correspondence will be found at pages 24–30 of the Record, and it will be seen that their refusal was exclusively based upon the allegation that the shipments in February and March were too small, and that in April was excessive. The agent of the plaintiffs then offered to deliver 1000 tons, strict measure (page 29), but this was declined, and they adhered to their refusal to say whether they would or would not receive further shipments (page 27).

According to the doctrine of Hochster *vs.* De La Tour, the refusal of the defendants would probably have warranted the plaintiffs in considering the contract at an end, but they preferred to avoid the risk of the question and to send forward the balance of the iron. The remaining shipments were as follows: In May, 1099 tons; June, 991 tons; July, 306 tons; all of which were tendered and refused. After carrying the iron for some months it was sold, after notice to the defendants and with their approval, at private sale, as it was believed that better prices could thus be obtained.

Upon the trial the defendants testified that when they accepted and paid for the 400 tons shipped in February, and wrote instructions in regard to the March shipments, they did not know that the iron had not been shipped " at the rate of about one thousand tons per month," and that as soon as they learned this fact they gave notice of their intention to reject the March and April shipments. The court then instructed the jury that if they believed this testimony they should find for the defendants. Upon the first trial the plaintiffs elected to suffer a nonsuit, with leave to move to take it off; and after argument the judges delivered oral opinions as follows :—

BUTLER, J.:—To justify an allowance of the motion we must be convinced that our ruling at the trial was wrong. We are not so convinced. The motion must, therefore, be dismissed.

For myself, however, I may say that I regard the point as involved in serious doubt; not so much when considered on general principles, as when viewed in the light of modern decisions. The right to rescind a contract for non-performance is a remedy as old as the law of contract itself. Where the contract is entire—indivisible—the right is unquestioned. The undertakings on the one side and on the other are dependent, and performance by one party cannot be enforced by the other without performance, or a tender of performance, on his own part. In the case before us the contract is "severable." But to say it is "severable," does not advance the plaintiff's argument. A "severable" contract, as the language imports, is a contract *liable* simply to be severed. In its origin, and till severed, it is entire—a single bargain, or transaction. The doctrine of severableness (if I may be allowed to coin a word), in contracts is an invention of the courts, in the interests of justice, designed to enable one who has partially performed, and is entitled on such partial performance to something from the other side, to sustain an action, in advance of complete performance—as where goods are sold to be delivered and paid for in parcels, to enable the seller to recover for the parcels delivered, in advance of completing his undertaking. But this equitable doctrine should not be invoked by one who had failed to perform, for the purpose of defeating the other's right to rescind, and thus to protect himself against the consequences of his own wrong. As against such a party the contract should be treated, and enforced, as entire. To say, therefore, that the contract is "severable," does not, I repeat, advance the argument. To render the plaintiff's position logical, it is necessary to take a step forward, and hold that such a transaction (it would not be accurate in this view to call it a contract) constitutes several distinct, independent contracts. Then, of course, it follows that a failure, as respects one of several successive deliveries, affords no right to rescind in regard to those yet to be made. And this step, after much apparent doubt and hesitation, the English courts have taken. It was the necessary outgrowth of the decision in Simpson *vs.* Crippen, which overruled Hoare *vs.* Rennie. In our own country the cases are inharmonious, and the question unsettled. After a careful examination of what has been said on the subject, I shall not be surprised if the courts here finally adopt the present English rule, and thus substitute compensation in damages for the remedy by rescission to the extent there done. I say this, however, not because I think it wise to adopt this rule, but because of an apparent leaning in that direction.

The question, however, as here presented, is properly for the Supreme Court, to which I hope it may be carried, and the rule thus be settled.

McKennan, J.:—I concur even more decidedly. I am not satisfied that the weight of the opinions, even in England, is with these decisions. So far as this country is concerned it cannot be said there is any such rule. I have such doubt of the justice of the rule that I am not willing to take this step forward. It is more respectful to remit this to the Supreme Court, and, therefore, I do not feel disposed to take the advanced step.

A new suit was then brought, and a formal verdict taken in order to bring the question before this court. It will be seen that the only question considered by the court below was whether, under such a contract, a purchaser who had accepted and paid for part of a monthly shipment could rescind as to the balance upon discovery that the full amount of that shipment had not been sent. In fact they did not at the time elect to rescind but simply to reject the March and April ship ments (page 25); but, as preliminary to any question as to the legal results of the contract, comes the construction of the contract, which permitted, according to the view of the plaintiff, a shipment of 400 tons in the first month and of 600 tons in the last month, or of 833 tons in each month—six months having been accorded for the shipment of 5000 tons. If this view be taken the other questions become unimportant.

ASSIGNMENTS OF ERROR.

1. The learned court erred in instructing the jury that if they believed the testimony of the defendants' witnesses to the effect that they had no notice at the time of accepting the

cargo paid for of the failure of the plaintiffs to ship about 1000 tons in the month of February, and that immediately upon learning that fact they gave notice of their intention to rescind, they should find for the defendants.

2. The learned court erred in directing the jury that the defendants were entitled to rescind the contract because of the plaintiffs' default in respect of the shipment in February.

3. The learned court erred in refusing to instruct the jury that the remedy was confined to reducing the claim for damages caused by the default of the plaintiffs in respect of the time of shipments.

POINTS OF ARGUMENT.

First Point.—The plaintiffs were not in default by reason of having shipped only 400 tons in the month of February.

The court below adopted the construction of the contract suggested by the defendants, viz., that the shipments were to be at the rate of about one thousand tons per month, beginning with the month of February, and that it was only the deficiencies covered by the word "about" that could be shipped at the option of the vendors in the sixth month. It is submitted, however, that the natural meaning to be given to the clause extending the time of performance for another month, is to give another month for performance, subject to the condition that defendants should not be obliged to take more than about 1000 tons in any one month. The circumstances of the case strengthen this view, as it is to be supposed that the mode of performance actually adopted was then present in the minds of the parties; and the difficulties in making shipments at remote and widely-scattered ports, having imperfect facilities for loading, by small sailing vessels, are such that naturally provision was made for accidents and unavoidable difficulties. As already suggested, the exemption from any obligation to replace lost shipments, and the inevitable uncertainty in respect to the time of arrival, tend to show that regularity and completeness of delivery were of secondary importance. If 833 tons had been shipped in each month, it is hard to see why it would not satisfy the precise letter of the contract; but if so, the balance of the 5000 tons could have been delivered in the five remaining months without requiring the defendants to take more than 1000 tons in any one month. That the tender of 1000 tons for April, out of the 1347 actually shipped, was proper, scarcely needs authority, but is settled by Borrowman *vs.* Free, L. R., 4 Q. B. Div., 500.

Should this view of the contract be accepted it will be unnecessary to consider further.

SECOND POINT.—The defendants did not elect to rescind the entire contract.

It is needless to refer to authorities to show that in order to rescind it is necessary to do so explicitly. This the defendants refused to do. In their letter of May 14th (page 24) they gave notice that they declined accepting the shipments made in March and April: and in that of May 17th (page 25) they say: "There is then the very serious and debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage." To this the agent of the plaintiff answered (page 26): "You say in your last paragraph that you shall avail yourselves of the advantage if you are absolved from the contract; but as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention." In reply (page 27) they said: "You ask us to declare whether we will or will not object to receive further shipments because of past defaults. *We tell you we will if we are entitled to do so,* and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule, and its uncertainty of application."

The word "*entitled*" was probably used in mistake, as it is clear that the defendants were still *entitled* to take the shipments made and tendered under a contract which the plaintiffs were contending was still in force; but even if erroneously employed for *bound* or *obliged*, it will be seen that there was no such renunciation of the contract as is necessary to constitute a rescission. On the contrary, the question which is now regarded as the decisive inquiry in the case of default under a divisible contract is whether the conduct of the party in default justifies the other side in considering that he has entirely renounced the contract or refused to go on with it; and here, even as late as June 15th (page 31), the defendants wrote in such a way as to leave it uncertain whether they regarded the contract as at an end or not.

By so playing fast and loose, they compelled the plaintiff to go on with their deliveries, as, if he had abandoned, they would then have been in a position to object that he had not completed his contract; and whether such was the motive in this case is immaterial, as it might well be in future cases; and it is important that in mercantile transactions men should be compelled to speak out promptly, and if they intend to get the benefit of rescission for themselves, that they should be obliged to give it to the other side. It is true that under the doctrine of Hochster *vs.* De La Tour, already cited, which has now been adopted by this court (Lowell *vs.* Ins. Co., 111 U. S., 264), the plaintiffs would have been quite clearly justified in suspending shipments; but their right to do so rested on a question of fact which must have gone to a jury, and the defendants cannot now allege that they did rescind, when they expressly and repeatedly refused to do so when asked to make their election. It is not worth while to incumber this brief with a citation of the authorities as to the necessity for prompt and decisive action, where a party proposes to rescind.

In every text-book upon the law of contracts they are collected by the score, and the proposition upon which we rely is elementary and fundamental.

THIRD POINT.—The defendants could not rescind after having accepted and paid for the first shipment.

It is equally unnecessary to elaborate this point. Even Lord Bramwell admits that, after a severable contract has been partly performed, rescission is impossible. The suggestion that the price per ton having been fixed by the contract, the amount paid is the exact equivalent to a restitution to the *status in quo* is ingenious, but it is an absolutely novel invention. To introduce such an innovation into the law of contracts would be purely judicial legislation, and without any justification on the score of necessity, justice, or public policy.

In Scott *vs.* Kittanning Coal Co., 89 Pa. St., 23, the question arose under a contract for the delivery of coal in monthly lots, and the defendants claimed the right to rescind because of a fraudulent substitution of other coal, which they had received and paid for without having discovered the fraud till after delivery to their customers. The right was denied, and in a note to the case in 19 Am. Law Reg., 423, Mr. Arthur Biddle collects many of the authorities, among others Lynn *vs.* Beekman, 20 How., 149, showing that there can be no rescission without restitution. In Morse *vs.* Brackett, 98 Mass., 205, the retention was only of the bag which had contained the article sold. The question is also considered in many of the cases to which attention will be called in the discussion of the remaining point.

FOURTH POINT.—The defendants were not entitled to rescind, even if there had been default in respect to the February shipment.

The question here raised is one of the first importance in the law of contracts, and, singularly enough, it has only been finally set at rest in England within the last few months, while no authoritative decision has yet been made in the United States. It involves the whole law of dependent and independent covenants, and of entire and severable or divisible contracts; and it cannot well be discussed without some reference to the great cases of Boone *vs.* Eyre, Pordage *vs.* Cole, and Cutter *vs.* Powell; but it is not proposed in this brief to do more than to refer briefly to the earlier authorities, which have only a general application to the subject, and then to present the later English decisions, in which the precise question has been considered and argued with unexampled earnestness by nearly every contemporary judge of eminence, until finally, in August last, the House of Lords settled the controversy upon that side of the Atlantic.

At the outset it is only necessary to point out that the contract in question is clearly severable or divisible. The shipments were to be made monthly. They were to come from any European port. They were in fact shipped in sailing vessels, in lots as small as eighty tons, and were from two to three months on the voyage. They were to be paid for on presentation of bills, accompanied by custom-house certificates of weight. The sellers were not bound to replace any parcel lost after shipment. The purchasers were importing merchants, who showed no special reason why regularity or punctuality or completeness of delivery was essential. The article sold was easily replaced, having no value except for remanufacture, and steadily declined in price from the date of the contract till the last tender and refusal. All the *indicia* of a divisible contract are found here, and just such contracts, in legal effect, have been over and over again declared severable.

The text-book statement of the distinction between entire and severable contracts which has oftenest met with the approval of the courts, is that contained in 2 Parsons on Contracts, 29–31: "If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. * * * But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items."

In Lucesco Oil Company *vs.* Brewer, 16 P. F. S., 351, the court, after quoting this statement, said: "This rule of classification is based on a distinction so simple, that it may be easily understood and readily applied. It is the consideration to be paid, and not the subject or thing to be performed, that determines the class to which a contract belongs. Its entirety or separableness depends not upon the singleness of its subject or the multiplicity of the items composing it, but upon the entireness of the consideration, or its express or implied apportionment to the several items constituting its subject. If the consideration is single, the contract is entire, whatever the number or variety of the items embraced in its subject; but if the consideration is apportioned expressly or impliedly to each of these items, the contract is severable. Judged by this criterion, there is no difficulty in determining to which class the contract in this case belongs. It is manifest, from an inspection of its provisions, that singleness or entirety of consideration cannot be predicated of it."

So in Morgan *vs.* McKee, 27 Sm., 229, the plaintiff contracted to deliver to the defendant four thousand barrels of oil to be delivered in monthly installments of five hundred barrels each. Of this contract the court said, the defendant "proposed to show that the contract was entire, when by its very terms, as set out in the offer, it was severable as respects its performance by both parties. The petroleum bought by the defendants was not to be delivered at one time for a single and entire consideration, to be paid when the delivery was complete, but it was deliverable monthly by the plaintiff in specified quantities, and the consideration was apportioned and payable as each delivery was made. The contract, therefore, was in its very nature severable, Lucesco Oil Co. *vs.* Brewer, 16 Sm., 351; and no understanding or agreement of the parties could render it entire so long as its provisions remained unchanged." If it should be said that the monthly delivery condition will excuse the other party from all further performance of stipulations depending upon such prior performance; but a failure to perform an independent stipulation, not amounting to a condition precedent, though it subject the party failing to damages, does not excuse the party on the other side from the performance of all stipulations on his part."

Such being the well-settled rule as to covenants, it is not easy to understand why there should be a distinction between covenants and parol contracts; and there is, in fact, no authority which establishes such a distinction. Hence, in dealing with real estate, it is conceded that if the contract is divisible the vendor can compel acceptance of one parcel, though unable to make title to the other, and this at law or in equity. A leading authority is Johnson *vs.* Johnson, 3 Bos. & Pul., 162. In such cases the question always is whether the parts are so related, that the acquisition of each was the consideration for the purchase of the others. If not, the vendor can recover, though unable to perform as stipulated.

Thus in Stoddard *vs.* Smith, 5 Binn., 355, there was a contract by the plaintiff to convey to the defendant forty-five building lots in a city; the plaintiff was unable to make title to five of the lots; the defendant sought to rescind the whole contract for this reason. This it was held he could not do; Tilghman, C. J., saying: "It has been contended, indeed, that the contract was so entire as to be incapable of division, and that a failure of title as to part dissolved the contract in the whole. It strikes me very differently. There are cases where failure of title to part ought to dissolve the whole contract, because that part may be so essential that the loss of it would render the residue of little value. Such would be the case of the loss of a mine or a valuable fishery attached to a parcel of poor land. Such also might be the case of a loss of a parcel of meadow or woodland, or the right of water necessary for turning a mill. The principle is this; that when the part lost appears to be so essential to the residue that it cannot be reasonably supposed the purchase would have been made without it, the contract is dissolved *in toto*. But what is the case under consideration? The loss of five lots not adjoining or particularly connected with the others. There was no evidence of their being any way essential to the use or full enjoyment of the residue, and as the price at which each of the lots was estimated in the contract between the plaintiff and Smith was proved on the trial, there could have been no difficulty in making a proper deduction for their loss."

So in Graver *vs.* Scott, 30 P. F. Smith, 88, the plaintiff contracted to sell to the defendant a tract of coal land, and also an adjacent lot for building; the vendor was subsequently unable to make title to the coal land; in an action against the purchaser to recover the price of the other lot, which the defendant refused to take because of the failure to convey the coal land, the defendant offered to show that the connection between the purchase of the two properties was that he intended to erect an oil refinery on the lot and to mine coal from the other to run the refinery. The Supreme Court held that this evidence was admissible for the purpose of showing the real intention of the parties, and that the question should have been submitted to the jury. But the court reaffirm the rule first quoted from Parsons, that in the absence of such extraneous testimony, the contract would have been treated as severable.

It is contended, however, that a different rule prevails in respect to land from that governing sales of chattels. No good reason can be assigned for the distinction. Time may be of the essence of a mercantile contract, but it is not necessarily so. In dealing with articles of a fluctuating value, courts of equity recognize the duty of promptness, but such cases are avowedly exceptional; and Chancellor Kent, in his Commentaries, blends the two classes, and treats of them as identical in principle. For convenience of reference the liberty is taken of presenting a very full extract from his discussion of the subject.

"If a title to a part of the chattels sold had totally failed, so as to defeat the object of the purchase, as if A. should sell to B. a pair of horses for carriage use, and the title to one of them should fail, it is evident, from analogous cases, that the whole purchase might be held void, even in a court of law. In the case of a sale of several lots of real property at auction, the purchaser purchased three lots, and paid the deposit-money, but the title to two of the lots failed; and Lord Kenyon ruled that it was one entire contract; and if the seller failed in making title to any one of the lots, the purchaser might rescind the contract, and refuse to take the other lots."*

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" In the case of a purchase of land where the title in part fails, the Court of Chancery will decree a return of the purchase-money, even after the purchase has been carried completely into execution by the delivery of the deed and payment of the money, provided there had been a fraudulent misrepresentation as to the title (Edwards *vs.* McLeary, Cooper's Eq. Rep., 308; Fenton *vs.* Browne, 14 Ves., 144). But if there be no ingredient of fraud, and the purchaser is not evicted, the insufficiency of the title is no ground for relief against a security given for the purchase-money, or for rescinding the purchase and claiming restitution of the money. The party is remitted to his remedies at law on his covenants to insure the title." * * * * * * * * *

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* "There are conflicting cases on this point; but in the English law the better opinion seems to be that if a purchaser contracts for the entirety of an estate, and a good title can only be made to a part of it, the purchaser will not be compelled to take it. This was the decision in Roffey *vs.* Shallcross, 4 Madd. Ch. Rep., 122, Phila. ed., and in Dalby *vs.* Pullen, 3 Simon's Rep., 29. In Casamajor *vs.* Strode, 1 Cooper's Sel. Ca., 510, 8 Conden Ch. R., 516, 2 Mylne & Keene, 724, Lord Chancellor Brougham said that the decision of Lord Kenyon in Chambers *vs.* Griffiths was not sound doctrine, and was contradicted by the cases of James *vs.* Shore, 1 Starkie, 426, and Roots *vs.* Dormer, 4 Barnw. & Adol., 77. He further said that Lord Eldon, in the note to Roffey *vs.* Shallcross, carried the rule too far the other way. The principle laid down by Lord Brougham as the medium one was, that the purchaser was not to be let off from his contract for one lot on the ground that the title to the other was bad, unless it appeared from the circumstances that the two lots were so connected that the purchaser would not have bought except in the expectation of possessing both lots."

"Lord Kenyon is reported to have held at *nisi prius*, that where a party purchases several distinct lots at a sale (in the case before him it was houses), and a title to one of the lots cannot be made, the purchaser is at liberty to repudiate the whole, so that he shall be loose as to the other lots, while the seller is fast; and this upon the supposition that the whole contract is necessarily entire, Chambers *vs.* Griffiths, 1 Esp., 150. That this is not a sound doctrine at law any more than in equity, I hold to be very clear. Lord Eldon is said to have expressed a similar opinion in Drewe *vs.* Hanson, 6 Ves., 675, but if so, it has escaped the reporter. The proposition is, indeed, in some measure sanctioned by a faint *dictum*, for it is nothing more. In Boyer *vs.* Blackwell, 3 Aust., 656, where, upon a suggestion at the bar, that as the purchaser had taken contiguous lots in confidence of having both, he ought to have an option of opening the biddings as to the one, if the other were taken from him, the reporter says, 'The court inclined to think this reasonable, but the purchaser chose to keep the other lots.' This clearly proves nothing; the case of James *vs.* Shore, 1 Stark., 426, before Lord Ellenborough, is distinctly contrary to Chambers *vs.* Griffiths, which was also plainly overruled in a late case in the King's Bench, of Roots *vs.* Lord Dormer, 4 B. & Adol., 77. It is to be observed that in neither of these cases was Chambers *vs.* Griffiths cited; a circumstance strongly confirming a suspicion suggested by the very inaccurate reference to Poole *vs.* Shergold, that the report of Chambers *vs.* Griffiths is not to be relied upon.

"If Lord Kenyon's reported opinion, but which he probably never held, carried the rule so much too far in favor of the purchaser, perhaps an opinion ascribed to Lord Eldon, and mentioned in Sir Edward Sugden's Treatise on Vendors and Purchasers, and in the note to Roffey *vs.* Shallcross, 4 Mad., 227, carries the rule almost as far the other way—that the purchasers of different lots are not to be connected together, unless there has been an understanding that the buyer should not take any if he could not have all. Clearly such an understanding will suffice to blend the whole into one contract; but it seems equally clear that the same complication may be effected, or rather evidenced, without any such understanding, that is without any express agreement to this effect. It is a question of circumstance; the lots may be connected from their nature; it may be shown that the purchase of the one was made with reference to the other. A mere suggestion of the party, a mere statement of his inclination or fancy, will not be sufficient; nor may the proof of anything of a private nature, not known to the vendor, suffice; but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all." Per Brougham, L. C.

"The cases are in opposition to each other, and they leave the question how far and to what extent a failure of title be a good defence, as between the original parties to an action for the consideration-money on a contract of sale, in a state of painful uncertainty.† * * * *

"I apprehend that in sales of land the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title. This is the strict English rule, both at law and in equity, and it applies equally to chattels when the vendor sells without any averment of title, and without possession. * * * * * *

"The good sense and equity of the law on this subject, is that if the defect of title, whether of lands or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether. This is the principle alluded to by Pothier, and repeated by Lord Erskine and Lord Kenyon. In South Carolina, it has been held, that if the deficiency in the quantity of land be so great as to defeat the object of the purchase, the vendee may rescind the bargain; and if the defects were not so great as to rescind the contract entirely, there might be a just abatement of price; and this doctrine applies equally to defects in the quantity and quality of land, and for unsoundness and defects in personal property.

"The same principle was declared in Pennsylvania, in the case of Stoddart *vs.* Smith, 5 Binney's Rep., 355, 363, on a contract for the purchase of land if there be a failure of title to part, and that part appears to be so essential to the residue that it cannot reasonably be supposed the purchase would have been made without it, as in the case of a loss of a mine, or of water necessary to a mill, or of a valuable fishery attached to a parcel of poor land, and by the loss of which the residue of the land was of little value, the contract may be dissolved *in toto*. But the court in the last case limited very much the right of rescinding a contract for a partial failure of title; for if the sale was of lots in different parts of a city, it was not dissolved by the failure of title to some of the lots, not adjoining or particularly connected with the others, nor essential to their use or enjoyment.

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† The general rule in the English law is, that the partial failure of performance by one party to a contract, for which there may be a compensation in damages, does not authorize the other party to put an end to it. Franklin *vs.* Miller, 4 Adolph. & Ellis, 268.

"It is to be regretted, that the embarrassment and contradiction which accompany the English and American cases on this subject cannot be relieved, by the establishment of some clear and definite rule, like that declared in France, which shall be of controlling influence and universal reception." 2 Kent's Commentaries, 470*, 473*, 475*.

So, too, Chitty says: "But it is a clearly-recognized principle that if there be only a partial failure of performance by one party to a contract for which there may be a compensation in damages, the contract is not put an end to."

2 Chitty on Contracts, 1092 (citing Franklin *vs.* Miller, 4 A. & E., 268; Johnassohn *vs.* Young, 4 B. & S., 296; Weaver *vs.* Sessions, 6 Taunt., 155; Keenan *vs.* Brown, 21 Vt., 86).

The case of Franklin *vs.* Miller, referred to by both Kent and Chitty, is important enough to justify a fuller citation The *syllabus* is as follows:—

"Declaration stated that defendant, being indebted to certain persons, agreed to repay plaintiff the amount of all accounts which he should settle for defendant; and also to pay plaintiff £40 a quarter on stated days, till the said debts should be fully settled; and plaintiff agreed to advance to defendant £1 per week, and certain other sums out of the sums of £40; that in consideration of plaintiff's promise, defendant agreed to perform the contract on his part; that plaintiff paid debts for defendant to divers persons (naming them) to the amount of £281; that the whole amount of debts was not yet settled; and that several sums of £40 had become due from defendant under the agreement, which had been paid to the amount of £160 only, but the rest were unpaid.

"Plea, as to two of the sums of £40, that before they became due, plaintiff had omitted to pay certain of the debts due to creditors of defendant (naming them), other than the creditors named in the declaration, which he might have paid; and had also omitted, after the last payment of £40, to pay defendant £1 per week; wherefore, defendant in a reasonable time, and before the two sums in question were due, rescinded the contract. Replication, that, before and at the time of the last payment of £40, defendant was indebted to the plaintiff in the sum of £50, and more, in respect of the moneys paid by plaintiff for defendant, as in the first count mentioned; and that the said £40 was insufficient to discharge the amount in which defendant was so indebted to plaintiff, and for which the agreement was a security.

"Held, that the plea was bad, as showing, at most, only a partial failure of performance by the plaintiff, which did not authorize the defendant to rescind the contract.

"*Quære*, whether the replication was good. Held by Coleridge, J., that it was bad."

In delivering judgment Littledale, J., said :—

"With respect to the plea the plaintiff may say, 'assuming that there has been a default made as to my part of the contract, it is only a partial breach, and the defendant's argument would go the length of insisting that if I had in any one week omitted to pay the sovereign he might put an end to the contract, and deprive me of all the money I have paid in advance, for he states that he has rescinded the agreement altogether.' It is a clearly-recognized principle that if there is only a partial failure of performance by one party to a contract for which there may be a compensation in damages, the contract is not put an end to. In Boone *vs.* Eyre, 1 H. Bl., 273, note (*a*), which was an action of covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation with the stock of negroes upon it in consideration of an annuity, and covenanted that he had good title and was lawfully possessed of the negroes, and the defendant covenanted that the plaintiff performing everything in the deed contained on his part he would pay the annuity, and the breach alleged was non-payment, the defendant pleaded that the defendant was not lawfully possessed of the negroes.' On demurrer to the plea Lord Mansfield said: 'The distinction is very clear. Where mutual covenants go to the whole of the consideration on both sides they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.' So here, it cannot be contended that if in any one week the sovereign had been unpaid, that default would put an end to a contract made up of several stipulations, some of which have been executed. It is immaterial to consider whether or not the replication be good."

Mr. Justice Coleridge added :—

"I think both the replication and the plea bad. The plea is not good, unless one party to a contract like this may treat it as rescinded, if the other fails in the slightest degree to perform his part of it. The rule is that in rescinding as in making a contract, both parties must concur. In Withers *vs.* Reynolds, 2 B. & Ad., 882, each load of straw was to be paid for on delivery. When the plaintiff said that he would not pay for the loads on delivery, that was a total failure ; and the plaintiff was no longer bound to deliver. In such a case it may be taken that the party refusing has abandoned the contract. The present case is different; and the plaintiff is entitled to judgment."

A more recent case is equally instructive. The facts sufficiently appear in an extract from the opinion of Chief Justice Erle; but it is important to note that the case arose upon a demurrer to pleas to the counts upon the contract, and the court expressly refused to put it upon the *indebitatus* count for the value of the work actually done.

> "The substance of the deed is, that the plaintiffs contract to light the parish lamps for a given period from sunset to sunrise with gas of good quality and sufficient in quantity; and the parish contract to pay the company for that service at the rate of £4 10s. per annum for each lamp. It is not one of unity of contract on one side and of promise on the other. Each is a severable contract and promise. It manifestly would be contrary to the intention of the parties, that the omission of the plaintiffs to light one lamp for a single night should defeat the claim of the plaintiffs to be paid the stipulated sum in respect of all the other lamps in the parish which were properly lighted. Mr. *Knowles* suggests that there is an *indebitatus* count, upon which the defendants have paid £1800 into court. But, when we are considering one count, and the rights of the parties in respect of the line of pleadings applicable to that count, we cannot have recourse to another for the purpose of assisting our judgment. *We can only deal with the two pleas before us and the demurrer to those pleas.* Here is a severable contract with a severable consideration and a severable promise. It would be monstrous to hold that the failure to keep one lamp alight should operate an entire destruction of the plaintiffs' claim, which it would do if we were to hold that the performance by them of each and every of the stipulations in the deed on their part was a condition precedent to their right to call upon the defendants for the stipulated payments." Erle, C. J., London Gas Light Co. *vs.* Chelsea (98 E. C. L. Rep., 237), J. Scott, N. S., 214.
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> "I am entirely of the same opinion. The pleas might be satisfied and proved by showing that on one night a single lamp went out in a high wind and remained unlighted. It never could have been the intention of the parties that the plaintiffs' right should be defeated by such a circumstance as that." London Gas Light Co. *vs.* Chelsea (98 E. C. L. Rep., 239; Willes, J.

It is unnecessary, however, to prolong the discussion of the abstract principle, as the exact question has been so fully considered by the English courts, under facts substantially identical with those presented by this record.

The case of Hoare *vs.* Rennie, 5 H. & N. 19, is an authority for the defendants in error, but it has been distinctly overruled. It was soon followed (1863) by Johnassohn *vs.* Young, 4 B. &

S., Queen's Bench, 296 (116 English Common Law Reports), which was as follows :—

> "Declaration on an agreement by the plaintiffs to sell and deliver to the defendant, and by the defendant to purchase, as many of the plaintiffs' N. gas coals, equal in quality to a cargo before shipped on trial, as one steam vessel to be sent by the defendant could fetch in nine months from S. to L. Breach : That the defendant refused to send a steam vessel to fetch divers cargoes of coal. Third plea : That before any breach by the defendant, the plaintiff broke the contract by delivering coal which was no part thereof gas coal equal in quality to the cargo shipped on trial, but was inferior thereto, and wholly unfit for the defendant's purposes, as the plaintiff well knew. Fourth plea : That, before any breach by the defendant, the plaintiff broke the contract by detaining an unreasonable time, and beyond the time permitted by the contract, the vessel sent by the defendant to receive the coal. Held, that neither of the pleas was an answer to the declaration."

It arose upon a demurrer to the pleas. In the American reprint there is a misprint, as it states that there "judgment was entered for the defendant." It should be, judgment for the plaintiff, the syllabus stating that neither plea was an answer, and it so appears in the report in the Law Journal. The English edition is not in the Law Library, but the whole case shows that it was judgment for the plaintiff.

The counsel referred to the case of Withers *vs.* Reynolds; and Crompton, J., says in reference to it, that that case belongs to the class in which the breach alleged is an entire frustration of the contract, and counsel in support of demurrer said :—

> "As soon as the defendant discovered that the plaintiff had knowingly sent an inferior coal, he was justified in throwing up the contract.
>
> "WIGHTMAN, J.:—Suppose the plaintiff intended in future to send such coal as was stipulated for ?
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> "BLACKBURN, J.:—The third plea does not aver that the plaintiffs persisted upon sending inferior coal.
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> "CROMPTON, J.:—The vice of both pleas is the same, that the breach goes only to part of the consideration. The argument for the defendant must go this length, that the supply of one chaldron of coal of an inferior quality, or the necessary detention of the defendant's vessel for one hour, would entitle him to put an end to the contract. In Hoare *vs.* Rennie, we must take it that time was of the essence of the contract.
>
> "BLACKBURN, J.:—The reasoning of the judges in that case does not apply to the plea pleaded in the second count. As reported, it looks as if the court forgot the second count.

"CROMPTON, J.:—We must consider that the breaches alleged in the pleas in that case went to the root of the matter. So that that case decided that, though they failed to send the right sort of coal, the substitution of another kind was no answer. How is there any difference between the failure to send the right sort and the failure to send at all?"

The next important case was that of Simpson *vs.* Crippin, Law Reports, 8 Q. B., 14. (1872.)

"The defendants agreed to supply the plaintiffs with from six thousand to eight thousand tons of coal, to be delivered into the plaintiffs' wagons, at the defendants' collieries in equal monthly quantities, during the period of twelve months, at five shillings and six pence per ton. During the first month, the plaintiffs sent wagons to receive only one hundred and fifty-eight tons. Immediately after the first month had expired, the defendants informed the plaintiffs that, as the plaintiffs had taken only one hundred and fifty-eight tons, defendants would annul the contract. The plaintiffs refused to allow the contract to be annulled, but the defendants declined to deliver any more coal:—

"Held, that the breach by the plaintiffs in taking less than the stipulated quantity during the first month, did not entitle the defendants to rescind the contract."

Of course, that case is the converse of this. The failure to take the whole quantity did not justify the seller; and conversely the failure to deliver the whole would not justify the buyer in rescinding. The remarks of the judge may be quoted at length:—

BLACKBURN, J.:—"I think that the rule ought to be discharged. It cannot be denied that the plaintiffs were bound in every month to send wagons capable of carrying, at least, five hundred tons, and that failing to perform this term they have committed a breach of the contract; and the question is, whether by this breach the contract was determined. The defendants contend, that the sending of a sufficient number of wagons by the plaintiffs, to receive the coal, was a condition precedent to the continuance of the contract, and they rely upon the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that Hoare *vs.* Rennie is in point, and that we ought not to go counter to the decision of a court of co-ordinate jurisdiction. It is, however, difficult to understand upon what principle Hoare *vs.* Rennie was decided. If the principle on which that case was decided is that wherever a plaintiff has broken his contract first, he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow Pordage *vs.* Cole. No reason has been pointed out why the defendants should not have to deliver the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. Hoare *vs.* Rennie was questioned in Johnassohn *vs.* Young.

MELLOR, J. :—"I agree, generally, with what my brother Blackburn has said, and I think that it is difficult to reconcile Hoare *vs.* Rennie with some of the other cases which have been cited; but I cannot distinguish that case from the present. Where the facts are not distinguishable, I think we are bound to give effect to the judgment of a court of co-ordinate jurisdiction. I should have thought, therefore, if the decision depended upon me, that in deference to that case we ought to make the rule absolute, and leave the plaintiffs to appeal.

LUSH, J. :—"I am of opinion that the rule should be discharged. I cannot understand the judgment in Hoare *vs.* Rennie. The court must have interpreted the contract in that case as if time were of its essence; there are no words here which import such a condition. If the parties intended that a breach of this kind should put an end to the contract, they ought to have provided for it by express stipulation."

In Roper *vs.* Johnson, L. R., 8 C. P. Div., 167 (1873), the question arose as to the measure of damages. The defendants, in April, agreed to sell, and the plaintiffs to buy three thousand tons of coal, at 8s. 6d., to be taken during the months of May, June, July, and August. No coal having been taken by the plaintiffs in May, the defendants wrote on the 31st of that month desiring the plaintiffs to consider the contract canceled. The plaintiffs did not assent to this, but on the 11th of June the defendants definitively refused to deliver any coal, and on the 3d of July the plaintiffs brought an action for this breach. The question was as to the market value, and the actual ruling was that in the absence of evidence, the plaintiffs could have obtained a new contract on such terms as to mitigate their damages; the true measure of damages was between the contract price and the market price. But they obtained a rule upon two grounds; first, defendants insisted that, plaintiffs not having taken any coal at all in the month of May, the defendants were entitled to declare the contract at an end, but the rule having been obtained, counsel conceded on the argument that the first branch of the rule was disposed of by Simpson *vs.* Crippin, which was decided in the Queen's Bench after their rule was granted.

In Freeth *vs.* Burr, L. R., 9 C. P., 208 (1874):—

> "The defendant contracted to sell to the plaintiffs two hundred and fifty tons pig iron, at 56s. per ton, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days after delivery of each parcel.
>
> "The market was rising, and notwithstanding urgent demands by the plaintiffs, the delivery of the first one hundred and twenty-five tons was not completed for nearly six months. The plaintiffs refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendants' default; but they still urged the delivery of the second parcel. The defendant treating the refusal to pay as a breach and as an abandonment of the contract by the plaintiffs, declined to deliver any more. There was no suggestion of inability on the part of the plaintiffs to pay, and the price of the first parcel was ultimately paid:—
>
> "Held, that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach."

In the course of his opinion Lord Coleridge made a statement of the rule governing these cases, which has since been frequently cited with approval, in the following terms:—

> "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free."

This same principle was acted upon in Bloomer *vs.* Bernstein, L. R., 9 C. P., 588, where, upon a sale of goods deliverable by installments, the buyer failed to pay for one installment. The case was submitted to the jury upon the question whether from all the facts in the case they could find that the buyer failed to pay because he did not intend to go on with the contract, and, the jury finding this fact in the affirmative, the court held that the seller was justified in repudiating the contract.

To the same effect are *Ex parte* Chalmers, L. R., 9 C. P., 289, and Morgan *vs.* Bain, L. R., 10 C. P., 15. After the first trial, the opinion of Mr. Benjamin was taken upon this very contract, and after stating that in his judgment that " under the law of England, as now conclusively settled (though the decisions at one time were somewhat conflicting), the plaintiffs have a good cause of action, and the defense set up would not be regarded as serious," he goes on to say :—

> "At the time when I wrote the second edition of my book on Sales, the cases of Hoare *vs.* Rennie and Simpson *vs.* Crippin were regarded by the profession here as as hardly reconcilable, and Hoare *vs.* Rennie, though regarded with distrust, was not considered to be finally overruled ; but I ventured at pages 737–8 to point out that in Roper *vs.* Johnson the case of Simpson *vs.* Crippin was treated *as settling the law on this point.*
>
> "Subsequently, in Freeth *vs.* Burr, the decision of Lord Coleridge so far reconciled the case of Hoare *vs.* Rennie with all the other cases, as to point out that the partial breach of an agreement *may* take place under circumstances which show that the party committing the breach intended to abandon the contract, and no longer to continue to execute his part of it. In such a case, a partial breach might justify the opposite party in saying : 'Well, if you don't intend to go on with the contract, I also withdraw from it, and give notice that it is rescinded.' In general, as in this very case, there is not the least difficulty in determining at once what the real intention is. It would be absurd even to suggest that the plaintiffs by failing to send the full installments of one thousand tons each in February and March, intended thereby to abandon the contract, inasmuch as they continued the shipments in April, May, &c. If, in any particular case, the conduct of the party committing the partial breach were such as to render his purpose doubtful, the question like any other disputed issue, would be determined by the jury."

The case of Brandt *vs.* Lawrence (1876), L. R., 1 Q. B. Div., 344, 346–7, is also in point:—

> "The defendant entered into two contracts, each of which was for the purchase from the plaintiff of 4500 quarters of Russian oats, more or less, 'shipment by steamer or steamers during February. Should ice at loading port prevent shipment within stipulated time shipment to be made immediately after reopening of the navigation.' The plaintiff shipped on board one steamer 4511 quarters to answer the first contract, and 1139 quarters to answer in part the second contract. The plaintiff also shipped on board another steamer a sufficient quantity of oats to complete the second contract. The shipment on the first steamer was made in time ; that on the second steamer was made too late : Held, that the defendant was bound to accept the 1139 quarters in part fulfillment of the second contract, notwithstanding that the other shipment on account of that contract was made too late."

In delivering judgment Mellish, L. J., said :—

"I think the legal inference is, that it was intended that the shipments should be made in different parcels, and that the purchaser was bound to accept them as they came if they were in time. He was not entitled to wait in order to see whether the whole was in time. Suppose one of the ships had been lost at sea, it could not surely be contended that the purchaser would have been entitled to reject the whole on that ground. * * * I am of opinion that there should be no rule. A mercantile jury have found that under all the circumstances the shipment by the 'Winstead' was made in time, and I see no reason for objecting to their finding. I should, indeed, have been disposed to object to it if it had been the other way. The other question is, whether the damages ought to be reduced. The 'Winstead' brought the whole of the oats included in the first contract, and also part of those which were comprised in the second contract. The remainder under that contract came in the 'Oxford' and that ship, as the jury had found was not in time. Was the purchaser bound to accept that part of the goods comprised in the second contract which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made by 'steamer or steamers.' A considerable quantity of oats applicable to the second contract was shipped by the 'Winstead,' which was in time, and I am of opinion that the defendant was bound to accept that part. I think that there should be no rule on this ground."

In Reuter *vs.* Sala the decision of the majority favors the view of the other side, but the dissenting opinion of Lord Justice Brett is so instructive that it may be presented at length :—

"In Johnassohn *vs.* Young, 4 B. & S., 297, an action was brought for not accepting coals. The contract was that the plaintiff would sell and deliver to the defendant as many coals equal to a former sample cargo as a steamer called the 'Great Northern,' could fetch in nine months, proceeding to and from Sunderland, from and to London, backwards and forwards in successive voyages. The steamer to be sent by the defendant, and the plaintiff to ship the coals at 5s. 9d. a ton, payment at the beginning of each month for the preceding month's shipments, less two and one-half per cent. discount. The defendant pleaded that in the first voyage the defendant shipped a cargo, not equal to sample. To this plea there was a demurrer. The failure of the first cargo was therefore admitted. It was impossible that the plaintiff could by any subsequent deliveries satisfy the contract, if it was one and indivisible; but the court held that the plea was bad, because the breach by the plaintiff went only to part of the consideration. Now the consideration for the whole of the defendant's undertaking, which was of course the undertaking to accept and to pay for all which the plaintiff was to deliver, was that the plaintiff undertook to deliver all, and to deliver a cargo each time that the defendant should send the steamer. The judgment is that the failure to deliver the first cargo according to contract, though an incurable failure, did not absolve the defendant from the duty of accepting the subsequent cargoes, because the failure as to the first cargo was only a breach of a part of the consideration moving from the plaintiff.

"Apply that case to the question raised in this. Here the whole consideration for the defendants' promise to accept the pepper was the plaintiffs' promise to deliver the whole twenty-five tons. The plaintiffs were ready and willing to deliver twenty tons, but failed by an incurable failure to be able to deliver the other five tons. The case cited answers that the failure of the plaintiffs is a breach of only a part of the consideration, and the defendants are not absolved from the duty of accepting the twenty tons. In Simpson *vs.* Crippin, Law Rep., 8 Q. B., 14, the action was for non-delivery of coal. The defendants agreed to supply the plaintiffs with from 6000 to 8000 tons of coal, to be delivered into defendants' wagons at plaintiffs' collieries in equal monthly quantities during the period of twelve months from the 1st of July at 5s. 6d. per ton; terms cash, monthly, less two and one-half per cent. discount. The plaintiffs failed to send wagons according to the contract in the first month; that was an incurable failure. Their part of the whole contract never could afterwards be fulfilled. The judge told the jury that as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants in point of law in canceling the contract. 'It cannot be denied,' says Blackburn, J., 'that the plaintiffs were bound in every month to send wagons capable of carrying at least 500 tons, and that by failing to perform this term, they have committed a breach of the contract, and the question is whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of wagons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely on the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract.' Apply that case to the present. The point taken on behalf of the defendants is, that by reason of the incurable breach as to the five tons, the defendants are entitled to rescind the contract as to the twenty tons. The answer is, no sufficient reason has been shown why damages would not be a compensation for the breach by the plaintiffs as to the five tons. In Brandt *vs.* Lawrence, 1 Q. B. D., 344, the action was for non-acceptance of oats. By the contract the defendant bought of the plaintiff 4500 quarters of Russian oats at 23s. per delivered 304 pounds, including freight and insurance to London. Shipment by steamer or steamers during February. Payment by cash on receipt of and in exchange for shipping documents, less interest at five per cent. for the unexpired portion of three months from date of bill of lading. In fulfillment the plaintiff tendered 1139 quarters per 'Winsland.' The defendant for a given reason refused to accept them. The plaintiff afterwards tendered the balance of quantity brought by a ship called the 'Oxford,' but brought too late. At the time of action brought, therefore, the plaintiff had tendered in good time a part of the oats, but had never tendered, and never could tender the balance within the terms of the contract, if treated as one and indivisible. It was argued for the defendant that the contract was an entire contract for the delivery of 4500 quarters of oats within a specified time; it could not be split into parts; if the whole was not shipped in time, the defendant was entitled to reject the part which was in time. The Queen's Bench Division thought that this was not so, because the contract says 'shipment by steamer or steamers.' In the Court of Appeal, Mellish, L. J., said:

'I think the legal inference is that it was intended that the shipment should be made (which must mean might be made) in different parcels, and that the purchaser was bound to accept them as they came, if they were in time;' and again, 'was the purchaser bound to accept that part of the goods which was shipped in time? I am of opinion that he was, because the contract says that the shipment is to be made by steamer or steamers.' That judgment was rested solely on the construction of the contract; no reliance was placed on any power of election by the seller to send by two ships instead of one. As the case stood it was the same as if he had only shipped a portion by one ship, and had never shipped the other portion by any ship. The late shipment was no shipment according to the contract. Apply that case to the present. The contention here is that the defendants were not bound to accept twenty tons, because there was no shipment and declaration of five tons according to contract. The question is, were the defendants the purchasers, bound to accept that part of the goods which was shipped and declared in time? The answer, according to the Queen's Bench Division, and on appeal in the case cited, is that they were, because the contract says that the shipment is to be —that is, may be—in 'sailing vessel or vessels.' Mellish, L. J., cited in that case the case of Simpson *vs.* Crippin, Law Rep., 8 Q. B., 14. It is obvious to my mind that he considered the case before him to be governed by that case, and that case was in its turn in terms founded on Johnassohn *vs.* Young, 4 B. & S., 297. The chief use of authoritative cases is to enable us to deduce, if we can, from them a general principle applicable to succeeding similar though not identical cases. It seems to me that the general principle to be deduced from these cases is, that where in a mercantile contract of purchase and sale of goods to be delivered and accepted, the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfill his part in any one or more of those deliveries, does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable, in the sense that he never could fulfill his undertaking to accept or deliver the whole of the specified quantity. The reasons given are, that such a breach by the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part; that the other party should have been or should be always ready and willing and able to accept or tender the whole. A consideration of the mercantile consequences of otherwise constructing such contracts seems to me to fortify the one construction and to condemn the other. Suppose in the case of shipments the seller has, by contracts made abroad, provided for all the successive shipments, and has taken up ships to proceed and call for the successive cargoes, and the first seller to him fails to fulfill his contract, so that the first shipment fails, the purchaser under the main contract we are discussing may, upon one construction suggested, throw up the whole contract, although he could be amply recompensed for the partial failure, and throw the loss of all the other purchases and charters upon the seller without compensation. So if the purchaser has made contracts, and fails to take delivery of one parcel, the seller, although he might be amply compensated for the partial failure, would be entitled to ruin the buyer with regard to his forward contracts without any compensation.

"Again, suppose any one of the ships lost after a perfectly good shipment by several ships, either buyer or seller might at once cancel the whole contract, to the irreparable loss of the other party, although he himself might be amply compensated by a payment in damages; or suppose a seller to send all the stipulated quantity in one ship, and a jettison to have become inevitable on the voyage, he is to have the whole of the remainder of the cargo left on his hands without compensation, although the buyer might easily be compensated for the short delivery. These considerations show that the rule of construction adopted by the courts is as sound on mercantile as it is on legal considerations, and all the considerations, both mercantile and legal, apply as much and as fully to the present contract as to those cited. The question of the time or mode of payment has nothing to do with the reasoning for or against either view; moreover, it is most important, in my opinion, that the construction of mercantile contracts should be broad and large, and should not depend on refined logical deductions, or on slight variations, either in the terms or the conditions of each particular contract. The contract, for instance, now before us differs as to the period and conditions of payment from that in Brandt *vs.* Lawrence, 1 Q. B. D., 344, but it differs very little as to the terms of payment from the other cited cases. That difference as to the periods of payment makes no difference in the reasons given for the decisions in those cases, in which the stipulation as to the payment was not noticed, and in Brandt *vs.* Lawrence it is not even reported.

"I am of opinion that the plaintiffs are entitled to recover in respect of twenty tons, leaving the defendants to a cross-action in respect of five tons." Reuter *vs.* Sala, Brett, L. J., 4 C. P. Div., 253-8. (1879.)

Another case which developed a conflict of opinion was

Houck *vs.* Muller, L. R., 7 Q. B. Div., 103 (1881), in which Lord Justice Brett again maintained his view of the law with great earnestness. In the course of his opinion he said :—

> "Now it is admitted ['If, indeed, the contract has been part performed and cannot be undone, then it must be proceeded with without such power of declaring off. If in this case the plaintiff had taken the November delivery, but had refused the December, the defendant would have been bound to make the January delivery ;' per Bramwell, L. J., p. 99] that if the first delivery was made and the second was not, but the third was, that then the failure by the seller to offer the second delivery would be no objection to his right to insist upon the acceptance of the third. That is admitted. But it is said that if there be a failure to offer the first delivery the acceptance of the second cannot be insisted upon. Now what is the rule of law by which a court of law ought to deal with mercantile transactions of this kind? To my mind merchants are not bound to make their contracts according to any rule of law, but the court of law, from the language which has been used, and from the known course of business amongst merchants with regard to the subject-matter of such contracts, must determine what is the interpretation to be put on such contracts amongst reasonable merchants, and when they have ascertained what that is, the court ought to apply it to the particular contract in question in the way in which reasonable business men, in the ordinary course of business, would apply it.
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> "Now such a contract as this in the present case for successive deliveries of goods at a sum per measure, is a somewhat modern kind of contract, but it has now been in existence for many years. It has been frequently considered, and the rule with regard to its construction seems to me to be this, that where the deliveries are to be so made, and the price of each to be so determined, then, inasmuch as the failure to perform one of the deliveries can be satisfied by damages, the failure in respect of one delivery does not prevent the party from having the other deliveries. That is not what is decided in Pordage *vs.* Cole, 1 Wm. Saund., 319 *l*, but is the doctrine contained in the notes to that case. The courts have not laid down that doctrine as an abstract proposition of law, but they have gathered it from the course of business amongst merchants, that where merchants have so contracted by separating the price as in case of failure of one of the deliveries to give an adequate remedy for it, that it is not their intention that such non-delivery should put an end to the contract, and prevent the party so failing from having a right to make subsequent deliveries.
>
> "But it is suggested that if there is a failure in the first delivery, then the party against whom that failure is committed may throw up the contract. But why? Supposing at the time of the first delivery there is no difference between the market price and the contract price of the goods, the person against whom the failure is made suffers positively no loss. But at the time of the second delivery the difference between the market

price and the contract price may be enormous; yet, at the time of the third delivery it is said, if you have fulfilled the contract as to the first delivery where it did not signify whether you did or not, but have failed in the second delivery where it was of the utmost consequence, nevertheless, you can insist upon the third delivery; but if you have failed in the first delivery where it was of no consequence at all, then, although the question of delivery of the second and third is of the utmost consequence, your right to them is to be of no avail. It seems to me that such a conclusion is so strained that with the greatest possible respect I should say as a matter of business it is absurd. Then is one bound to come to such a conclusion when one's duty is to apply that which would be the conduct of all reasonable merchants? It seems to me that one is not. The notes to Pordage *vs.* Cole seem to me to be clear, and to make no distinction whatever as between the first delivery or any other. The case of Simpson *vs.* Crippin, Law Rep., 8 Q. B., 14, distinctly states there is no difference with regard to the first delivery or any other. It is objected to that case that the learned judges said they did not understand the case of Hoare *vs.* Rennie, 5 H. & N., 19; 29 L. J. (Ex.), 73. It seems to me not that they meant to say they did not understand Hoare *vs.* Rennie, but that they could not understand that the principle of law was rightly applied there.

"In other words, they meant to say they differed from Hoare *vs.* Rennie. So do I, for the reasons I have given. In my opinion Hoare *vs.* Rennie was wrongly decided, and I prefer Simpson *vs.* Crippin. I prefer what Lord Blackburn said in that last case, namely, in such a contract as this the doctrine contained in the notes to Pordage *vs.* Cole, 1 Wm. Saund. 319 *l.*, ought to be applied. With regard to the case of Englehart *vs.* Rosanquet, the facts there seem to have been exactly like those in *Hoare* vs. *Rennie*, and therefore, the judges were bound to follow that case. But in the Court of Appeal we are not bound to do so, and I prefer the doctrine laid down in Simpson *vs.* Crippin, by the judges who, to my mind, showed that in their opinion Hoare *vs.* Rennie was wrongly decided. I think that they were right, and that Hoare *vs.* Rennie was wrong."

The comments of the *Solicitors' Journal and Reporter* of July 23d, 1881, upon this case are copied by the *American Law Review*, vol. xv., page 687.

The question, however, was finally settled in the case of the Mersey Steel and Iron Co. *vs.* Naylor, L. R. 9 Q. B. Div., 648 (1882).

The *syllabus* in the report in the House of Lords (9 Appeal Cases 1434, 1884) is as follows:—

"The respondents bought from the appellant company 5000 tons of steel of the company's make, to be delivered 1000 tons monthly, commencing January, 1881, payment within three days after receipt of shipping documents. In January the company delivered part only of that month's installment, and in the beginning of February made a further delivery. On the 2d of February, shortly before payment for these deliveries became due, a petition was presented to wind up the company. The respondents *bona fide*, under the erroneous advice of their solicitor that they could not without leave of the court safely pay pending the petition, objected to make the payments then due unless the company obtained the sanction of the court, which they asked the company to obtain. On the 10th of February the company informed the respondents that they should consider the refusal to pay as a breach of contract releasing the company from any further obligations. On the 15th of February an order was made to wind up the company by the court. A correspondence ensued between the respondents and the liquidator, in which the respondents claimed damages for failure to deliver the January installment and a right to deduct those damages from any payments then due; and said that they always had been and still were ready to accept such deliveries and make such payments as ought to be accepted and made under the contract subject to the right of set-off. The liquidator made no further deliveries, and brought an action in the name of the company for the price of the steel delivered. The respondents counter-claimed for damages for breaches of contract for non-delivery:—

"Held, affirming the decision of the Court of Appeal, that, upon the true construction of the contract, payment for a previous delivery was not a condition precedent to the right to claim the next delivery; that the respondents had not, by postponing payment under erroneous advice, acted so as to show an intention to repudiate the contract, or so as to release the company from further performance."

In the Court of Appeal Sir George Jessel, M. R., said:—

"If one party breaks a contract is the other party bound to perform his part of it or not? There is no absolute rule which can be laid down in express terms as to whether a breach of contract on the one side has exonerated the other from performance of his part of the contract. But I think the rule of law is properly stated in Freeth *vs*. Burr, Law Rep. 9 C. P., 208, and it is stated in a very few words by the judge from whose decision this appeal comes. He says, 'I say this in order to explain the ground upon which I think the decisions in cases must rest. There has been some conflict amongst them; but I think it may be taken that the fair result of them is as I have stated, namely, that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.' That makes it a question of evidence; you must consider the nature of the breach, the circumstances under which the breach occurred, and then see whether that is the result of it. There may, indeed, be a case where one party says in so many words that he does not intend to go on with the contract, but generally you must infer the intention from the acts of the parties. Then he goes on: 'Now non-payment on the one hand or non-delivery on the other may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.' If you have the act so done on the one side, the other party, if he elects to be free, is no longer liable to perform his part of the contract. Now in Freeth *vs.* Burr, and the other cases on the subject, no such distinction is taken as is referred to by Lord Bramwell, if I rightly read his judgment in Houck *vs.* Muller, 7 Q. B. D., 92, between the case of a contract partly performed and a contract never performed at all. In Freeth *vs.* Burr there had been part performance. In the case of the Phœnix Bessemer Steel Co., 4 Ch. D., 108, the point was not argued. That was an action founded on a contract for selling goods on credit. The vendors had said : 'We will not sell you the goods any more except for cash.' The other side said: 'But we are entitled to credit, and if you will not sell them to us except for cash, we will not take them at all, and there shall be end an of it.' The only point argued was whether the persons who were entitled to the credit were insolvent in such a way, and to such an extent, that the vendors had a right to say, 'We will not sell except for cash.' That was the only point argued. Nobody argued that upon the refusal of the vendors to sell without cash, and when the answer is, 'We must decline to take the iron,' the vendors were released from the contract.

"I held that they were not when the case came originally before me at the Rolls, and the Court of Appeal affirmed that decision. That was the case of a contract which had been part performed to a very considerable extent. So, again, in Withers *vs.* Reynolds, 2 B. & Ad., 882, the contract had been partly performed. The notion, therefore, that there is any difference in this respect between a contract part performed and a contract not performed at all, is not, I think, well founded. I am not sure that I am right in supposing that Lord Bramwell in Houck *vs.* Muller, 7 Q. B. D., 92, intended to say that, in no case where the contract was part performed, could one party rely on the refusal of the other to go on, although that seems to me to be the fair construction of his judgment. Again, in Simpson *vs.* Crippin, Law Rep. 8 Q. B., 14, no such distinction was taken. Hoare *vs.* Rennie, 5 H. & N., 19, was on demurrer, which the judges seem to have forgotten, and to have treated it as a special case and drawn inferences of fact."

Lord Justice Lindley added :—

"Now I certainly do not pretend to reconcile Hoare *vs.* Rennie, 5 H. & N., 19, Simpson *vs.* Crippin, Law Rep., 8 Q., B., 14, and Houck *vs.* Muller, 7 Q. B. D., 92. I can undersand each case by itself, but there is very considerable difficulty in reconciling them. It is not, however necessary to do that; what we have to do is to extract from the cases some intelligible principle by which to be guided; and it appears to me that the principle is stated accurately in Freeth *vs.* Burr, by Lord Coleridge himself, in delivering his judgment in that case. What he says as to the result of the cases is: 'The true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract.' I think that is the fair way of testing each of these cases."

Bowen, L. J., was equally emphatic:—

"With regard to the first point, whether the plaintiffs were justified here in refusing to deliver further, and in treating the contract as determined by reason of the non-payment and the conduct of the defendants, I desire to say that I think the true test is the one laid down in Freeth *vs.* Burr. Nor do I understand that the Lord Chief Justice really desired to depart from the principle which is to be found in the judgment of that case, a judgment which was delivered by himself. I think there has been a mistake in the short-hand notes of his judgment in the present instance, and that he did not mean to say that the test was whether the conduct of one party to the contract was inconsistent with the contract, because of course every breach of contract is inconsistent with the contract, but that the test was whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract.

"Now, in cases where the court has to determine whether that principle of law applies, the facts may approach nearer to the line, or may be at a greater distance from it; and the difficulty is that the judges have had to draw inferences from the particular facts in order to determine whether the principle applies. Non-delivery of a single parcel would not be necessarily, of course, sufficient to intimate that the person who does not deliver intends no longer to be bound, but I am far from saying that non-delivery of a single parcel might not in particular contracts, and under particular circumstances, be sufficient. So, as to non-payment. Non-payment of itself, is certainly not necessarily evidence of an intention no longer to be bound by the contract, but I do not say there might not be circumstances under which the court would be entitled to draw that inference from it. If Lord Bramwell, in Houck *vs.* Muller, 7 B. Q. D., 92, is to be understood as saying that the doctrine can no longer be applied when the contract has been part performed, it seems to me that his observation goes beyond what can be supported, for, as the Master of the Rolls has pointed out, many of the cases where one party was allowed to treat the conduct of the other as putting an end to the contract were cases in which the contract had been part performed. A fallacy may possibly lurk in the use of the word 'rescission.' It is perfectly true that a contract, as it is made by the joint will of two parties, can only be rescinded by the joint will of the two parties, but we are dealing here, not with the right of one party to rescind the contract, but with his right to treat a wrongful repudiation of the contract by the other party as a complete renunciation of it.

"With regard to Hoare *vs.* Rennie, 5 H. & N., 19, I think that the true explanation of that case is that the plea was a special plea, which set out various facts from which two different inferences might quite well be drawn, and as one or the other is drawn, the decision would appear correct or the reverse. Upon the first point in the case I agree with the Master of the Rolls and Lindley, L. J., in thinking that the correspondence in this case case does not show such a refusal on the part of the defendants to be bound in future by the contract as entitled the plaintiffs to consider the contract at an end."

In the House of Lords the counsel for the plaintiff in error contended :—

"As to the first point, the rights of the parties upon the contract, the Court of Appeal did not apply the true principle for the determination of a case like the present. A contract of the kind now sued on is made on the assumption that the parcel already delivered will be paid for punctually and in time to put the manufacturer in funds to provide for the manufacture and delivery of the next parcel. If either party to such a contract breaks it in a material part the other is absolved from performing his part: Hoare *vs.* Rennie, 5 H. & N., 19; Houck *vs.* Muller, 7 Q. B. D., 92. Payment for one parcel is a condition precedent to the delivery of the next. If the purchaser is solvent he ought to pay; if insolvent it is unjust that he should have delivery; and the seller is justified in refusing to deliver: Turnbull *vs.* McLean, 1 Court Sess. Cas., 4th Ser., 730. The question which must be decided here was left open by Patteson, J., in Withers *vs.* Reynolds, 2 B. & Ad., 882, 885. The Court of Appeal proceeded on the ground that in order to set free the vendor the purchaser must evince an intention not to perform the rest of the contract. That cannot be; it is enough if one party refuses to perform any material part, in other words if the contract originally made is substantially different from the contract which the purchaser seeks to enforce upon the vendor. The law gives no damages or remedy for the breach of a contract to pay money, not even interest, unless stipulated or recoverable under the statute; therefore the courts should be slow to compel the vendor to deliver without payment. Up to the 15th of February the respondents declined to pay, under a mistaken notion that the appellants could not give a discharge; after that date they refused to pay because they claimed to deduct unliquidated damages. They had no right thus to take the law into their own hands. Though not so expressed, payment is implied as a condition precedent: see notes to Pordage *vs.* Cole, 1 Wms. Saund., 548, ed. 1871; Graves *vs.* Legg, 9 Ex., 709; Coddington *vs.* Paleologo, Law Rep., 2 Ex., 193; Bradford *vs.* Williams, Law Rep., 7 Ex., 259, per Martin B. The rule in equity that time is not of the essence of the contract does not apply in mercantile contracts: Reuter *vs.* Sala, 4 C. P. D., 239, 249, per Cotton, L. J.; Freeth *vs.* Burr, Law Rep., 9 C. P., 208, was wrongly decided, but if right is distinguishable."

In the course of his opinion Lord Selborne said :—

"I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in Freeth *vs.* Burr, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other ; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part ; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why I cannot adopt Mr. Cohen's argument as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within the rules of law applicable to conditions precedent.

"If it were so, of course there would be an end of the case ; but to me it is plain, beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. The contract is for the purchase of 5000 tons of steel blooms of the company's manufacture ; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, 'Delivery 1000 tons monthly commencing January next ;' and as to the time of payment, 'Payment net cash within three days after receipt of shipping documents' ; but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment ; and, that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfillment of the unfulfilled part of the contract, by the delivery of the undelivered steel."

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Lord Blackburn added :—

"As to the first point, I myself have no doubt that Withers *vs.* Reynolds, 2 B. & Ad., 882, correctly lays down the law to this extent, that where there is a contract which is to be performed in future, if one of the parties has said to the other in effect, 'If you go on and perform your side of the contract, I will not perform mine' (in Withers *vs.* Reynolds it was, 'You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand, so as to have a check upon you'), that in effect amounts to saying, 'I will not perform the contract.' In that case, the other party may say, 'You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract.' That was settled in Hochster *vs.* De La Tour, 2 E. & B., 678, in the Queen's Bench, and has never been doubted since; because there is a breach of the contract, although the time indicated in the contract has not arrived.

"That is the law as laid down in Withers *vs.* Reynolds. That is, I will not say the only ground of defense, but a sufficient ground of defense. In Freeth *vs.* Burr, Law Rep., 9 C. P., 208, it was also so laid down; and Lord Coleridge here thinks the facts were such as to bring the case within that principle. I will not at this time of the day go through them, but when the facts are looked at, it is to me clear that that is not so. So far from the respondents saying, that when the iron was brought in future they would not pay for it, they were always anxious to get it, and for a very good reason, that the price had risen high above the contract price. There was a statement that for reasons which they thought sufficient, they were not willing to pay for the iron at present; and if that statement had been an absolute refusal to pay, saying 'because we have power to do wrong, we will refuse to pay the money that we ought to pay,' I will not say that it might not have been evidenc to go to the jury for them to say whether it would not amount to a refusal to go on with the contract in future, for a man might reasonably so consider it. But there is nothing of that kind here; it was a *bona fide* statement, and a very plausible statement. I will not say more. I refrain from weighing its value at this moment; but, as I said before, it prevents the case from coming within the authority of Withers *vs.* Reynolds and Freeth *vs.* Burr, and consequently, as I understand it, Lord Coleridge made a mistake in the ground on which he went. The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to Pordage *vs.* Cole, 1 Wms. Saund., 548 (ed. 1871)), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defense to say, 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.' But Mr. Cohen contended that whenever there was a breach of the contract at all (I think he hardly continued to contend that after a little while, but he said whenever there was a breach of a material part of the contract) it necessarily went to the root of the matter. I cannot agree with that at all. I quite agree that when there were a certain number of tons of the article delivered, it was a material part of the contract that the man was to pay, but it was not a part of the contract that went to the root of the consideration in the matter. There was a delay in fulfilling the obligation to pay the money, it may have been with or without good reason (if that would have made any difference), but it did not go to the root or essence of the contract, nor do I think that there is any sound principle upon which it could do so. I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract. With regard to the case of Hoare *vs.* Rennie, 5 H. & N., 19, it has been said that the Chief Baron there went so far as to say that it was the essence and substance of the contract that the whole of the 166 tons of iron, and no less, should be delivered. If it was so, it would follow that when in the present case the January shipment had not been made, and the company could only deliver part of the quantity, it went to the essence of thecontract. The question depends upon whether the whole and no less is the essence of it. And again, in Houck *vs.* Muller, 7 Q. B. D., 92, which has been referred to, it is expressly and pointedly shown that that was the ground taken, and the noble and learned Lord opposite (Lord Bramwell) stated that in his opinion the contract of the one party was to deliver, and of the other to take, 2000 tons of iron, and that inasmuch as it was to be by three installments, and the first was gone and there never could be more than two-thirds of the quantity, the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two-thirds when the plaintiff required the two-thirds only. Supposing that that was the true construction of the contract, I think that that would be the right conclusion. The present Master of the Rolls seems, if I understand him rightly, to have thought that that was not the true construction of the contract; whether it was or not I do not express any opinion, except to point out that whatever be the construction of other contracts, there is not in my mind the slightest pretext for saying that such is the construction of this contract, and, that being so, these cases have really no bearing upon the matter.

"The circumstances being as I have said, the contract not being such as to make this payment a condition precedent, or to make punctual payment for one lot of iron which has been delivered a matter causing the contract to deliver other iron afterwards to be a dependent contract, being of opinion that that is not the meaning of the contract, I think that the decision of the Court of Appeal was right."

The question has thus been finally put at rest in England, and there is every reason why the rule as understood and accepted there should be adopted in this country. The citations from text writers and decisions suffice, it is believed, to show that the result reached is entirely in accordance with principle and precedent apart from the late English cases.

It is difficult to understand how it can be maintained that there is anything contrary to recognized rules in the contention that even in an executory contract for the sale of chattels the inability to perform it in every particular, though exact compensation may be made, is not a bar to the right to insist upon the performance of other and independent parts of the contract. This does not rest in any sense upon the authority of Boone *vs.* Eyre. It is undoubtedly true that that case is simply an illustration of the doctrine of partial or unpunctual performance accepted and retained, and which is very satisfactorily explained in Phillips Const. Co. *vs.* Seymour 1 Otto, 646, 650; but many cases arose upon a refusal to go on because of the partial failure; and the criterion now universally accepted in respect to real estate is equally applicable to cases like the present. The ingenuity of counsel can readily suggest instances in which it would be ruinous to the purchaser if there should be a failure in delivery. In the supply of materials to a manufacturer the regularity and punctuality of delivery are of the essence of the contract. In such a contract, even though payments might be made at each delivery, it might fairly be contended that the parts were so related that the contract was entire, or rather that the default in any parcel went to the whole consideration. The same sort of evidence might be offered as is alluded to by Lord Brougham in Casamajor *vs.* Strode. There would be no violation of principle in thus putting the court and jury in possession of the circumstances under which the contract was made. This was the ground upon which Hadley *vs.* Baxendale was put. Whether the carrier is liable for the loss of profits which might have been made by the shipper if the delivery had been prompt may depend upon the question of notice. See also Horne *vs.* Midland Railway Co., L. R., 8 C. P., 131.

In like manner, in a proper case where time was not of the essence of a contract when entered into, it may be made so by subsequent notice. (Nokes *vs.* Lord Kilmorey, 1 DeG. & Sm., 444; Nott *vs.* Riccard, 22 Beav., 533.) And so, when a hypothetical case can be suggested of hardship or injustice from the failure to deliver promptly, punctually, and regularly, it may become a question for the court, with or without the assistance of the jury, whether it was not the intention that the contract should be entire, so that the failure would, as in Pordage *vs.* Cole, go to the entire consideration; but in the absence of such evidence, the criterion suggested by Chief Justice Coleridge is the only one which reconciles all the authorities, and is consistent with equity and good sense.

SAM'L. DICKSON,
J. C. BULLITT,
For Plaintiff in Error.

NOTE.

Contributed to the *American Law Register* (volume xxi., pages 398-408) by Lucius S. Landreth, Esq., of the Philadelphia Bar.

As will be seen by the opinions in the principal case, great doubt was experienced by the court as to the correctness of the decision arrived at. This doubt was the natural result of the conflict of authority upon the point, a conflict, however, generally more apparent than real. The question is one of great interest, and its proper determination is of the highest importance to the commercial and mercantile world. In delivering the opinion of the court in Ligget *vs.* Smith, 3 Watts, 332, the late Chief Justice Gibson began by saying: "Previous to the decision of Boone *vs.* Eyre, 1 H. Bl., 273 (note *a*), it seems to have been taken that nothing less than entire performance of a mutual covenant would entitle a party to his action for a breach on the other side. In that case, however, a more reasonable and just rule was adopted, by which a mutual or dependent covenant which goes but to a part of the consideration on both sides, and whose breach may be compensated in damages, is to be treated exactly as if it were separate and independent. This is distinctly the principle, and has been established by a train of decisions both in England and this country which it is unnecessary to quote." The case of Boone *vs.* Eyre, *supra*, was this: Plaintiff conveyed to defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that, the plaintiff well and truly performing all and everything therein contained on his part to be performed, the defendant would pay the annuity. The action was covenant, the breach assigned being the non-payment of the annuity. Plea, that the plaintiff had no good title to the negroes to convey. Demurrer to the plea, and judgment thereon for the plaintiff, upon the principle recited in Ligget *vs.* Smith, *supra;* Lord Mansfield pithily remarking, that to hold otherwise would make the failure of the plaintiff's property in one negro a bar to the action. So that it results from this, that recovery can be had, even on contracts in consideration of performance, when the part broken on one side does not go to the entire consideration. But where covenants are mutually dependent, the one upon the other, there must be performance by one party before suit can be maintained for a breach by the other. Pordage *vs.* Cole, 1 Wms. Saunders (Sir E. V. Williams's ed.), 548, is a strong example of the same tendency, that is, to hold either party bound to a performance of his part of the contract unless he can show the absolute interdependence of the two covenants or contracts. So in Fothergill *vs.* Walton, 8 Taunt., 576, where the contract was a charter-party between ship owners and freighters, and the ship owner covenanted to take on board six pipes of brandy at Havre, and therewith proceed to Terceira, and there take on board a cargo of fruit or other goods, as the freighters might think fit, and proceed to London or Bristol as might be ordered by the freighters, and there make a true and right delivery of the fruit, and the freighters covenanted to pay freight for the fruit and brandy, the freight of the brandy, &c., to be taken out in fruit at Terceira, and guaranteed the ship a full cargo home, it was held that the agreement to take brandy to Terceira was not a condition precedent, but a distinct and independent covenant. And, the action being against the freighters for not putting on a full cargo at Terceira, the owners having averred generally performance, a demurrer to the declaration was overruled. This case is an instructive example, and the arguments of counsel show clearly what was at that time the understanding of the profession upon the point. In support of the demurrer, Lens, Serjt., argued, that an averment of general performance was not enough ; that the defendants would have been able to barter the brandy for the return cargo of fruit, but that they were unable to get the full cargo because of the plaintiff's failure. He was asked by Dallas, C. J., the awkward question, whether, if the plaintiff had omitted willfully to get more than five tierces of brandy when he might have had six, the defendant ("plaintiff" in the text, but evidently a mistake) would have been discharged? It was answered, that then the plaintiff must have averred that no more was to be had. Vaughan, Serjt., *contra*, justly pronounces this unsound, and says that if the delivery of the brandy was a condition precedent, the carrying of five instead of six tierces would not suffice, and the plaintiff could not recover. He cites Storer *vs.* Gordon, 3 M. & S., 308, a very analogous case. In reply, Lens, Serjt., admitted, that if the homeward voyage did not grow out of the outward voyage, the defendant must fail, and fail he did. The law was clearly expounded in a short opinion by Dallas, C. J., and the doctrine therein laid down is said to have all the weight which some of the greatest names in Westminster Hall can give it. See also the opinions of Lawrence and Le Blanc, JJ., in Glazebrook *vs.* Woodrow, 8 T. R., 366. A case very analogous to, and somewhat stronger than, Fothergill *vs.* Walton is Storer *vs.* Gordon, *supra.* Numerous other cases might be mentioned. The principle enunciated in Fothergill *vs.* Walton is familiar to all the early decisions, and was affirmed with a few apparent exceptions, until the case of Hoare *vs.* Rennie, 5 H. & N., 19, S. C. 29 L. J. (Ex.), 73, which is a very important case, and deserves careful consideration. The case was this. Defendants bought of plaintiffs 667 tons of Swedish iron, said iron to be shipped from Sweden in the months of June, July, August, and September, in about equal portions each month, at a fixed price per ton delivered in London. Plaintiff shipped only 21 tons in June, which arrived in July. Defendant refused to accept the iron, and gave notice of rescission, and the plaintiff then brought suit upon the contract. It was held by the whole court that the defendants had the right to rescind. No authority is cited by any of the learned barons in support of their opinions, and only one or two cases mentioned, and the greatest light thrown upon the decision is from a remark of Pollock, B (L. J., 29 Ex., 77): "The question is one of law for the court under all the circumstances of the case, but where parties have made an agreement the court ought not to make another agreement for them merely because of laxity in the terms of the agreement." Certainly it was a case in which the plaintiff was entitled to but little consideration; his first shipment had been grossly incomplete and had arrived late, and he had made no offer or tender of the subsequent monthly shipments. It must also be remembered that the action was for a refusal to accept the incomplete first shipment, and it might very reasonably be urged that while an incomplete shipment in June would not excuse the defendants from accepting a proper shipment in July, yet they could not be compelled to accept a *portion* of any one *entire* shipment. Moreover, as noticed in Freeth *vs.* Burr, *infra*, a shipment of so small a portion might have been considered a complete breach by anticipation. Hoare *vs.* Rennie, *supra*, however, even with its peculiar circumstances, did not find favor with the courts in subsequent cases. In Jonassohn *vs.* Young, 32 L. J., Q. B., 385, Crompton, J., says, in differently deciding an analogous case, that in Hoare *vs.* Rennie, the court must have considered time as of the essence of the contract. And this is indicated by the remark of Pollock, C. B., quoted *supra*. In Simpson *vs.* Crippin, L. R., 8 Q. B. 14, where the facts were very similar to those in Hoare *vs.* Rennie, that case was practically overruled, the judges, Blackburn, Mellor, and Lush, declaring themselves unable to understand it; Lush, J., saying, as above, that time must have been considered of the essence of the contract. And in Freeth *vs.* Burr L. R., 9 C. P., 208, the court says that Hoare *vs.* Rennie is to be supported on the ground that there was a prospective abandonment of the contract by the plaintiffs. The action of the court in Freeth *vs.* Burr shows how well satisfied its members were of the general rule. The question came before them thus: At the trial, before Brett, J., he directed a verdict for the plaintiff, subject to the defendant's right to move for a nonsuit, if the court were of opinion that the plaintiff's conduct amounted to an abandonment of the contract. According to the English practice, the defendant then took a rule *nisi*. The facts were, that a quantity of iron was to be delivered in two shipments, the first in two weeks, the second in four weeks, to be paid for two weeks after each delivery. The first delivery was not completed for six months. Plaintiffs, the vendees, refused to pay, claiming to set off the damages for delay, but demanded the second delivery. This being refused, suit was brought. Counsel appearing against the rule were *stopped by the court*, although Hoare *vs.* Rennie was cited and argued from at length by the other side. Lord Coleridge's opinion, concurred in by Justices Keating and Denman, is certainly entitled to very great weight. In Roper *vs.* Johnson, L. R., 8 C. P., 167, 172, Simpson *vs.* Crippin is considered as settling the law. Even the cases which recognize Hoare *vs.* Rennie, of which Bradford *vs.* Williams, L. R., 7 Ex., 259, is one, do so upon the special circumstances of the case, recognizing the true rule, namely, that in every case the *intention* of the parties as gathered from the contract must govern. It would be useless to multiply authorities in England. The great weight of authority there is clearly against the rule adopted in the principal case. A very recent case, however, Houck *vs.* Muller, L. R., 7 Q. B. Div., 92, is undoubtedly an authority the other way; this decision is so important and extraordinary, that it deserves careful consideration. The defendant, in October, 1879, sold to the plaintiff 2000 tons of pig iron, to be delivered in November, 1879, or, "equally in November, December, and January next," at 6*d*. per ton. Plaintiff failed to take any iron in November, but claimed the December and January deliveries. The defendants declined to make the two last deliveries, and gave notice that they considered the contract canceled by the plaintiff's failure to take the November delivery. It was held, reversing the court below, that the defendant's refusal was justifiable. From this judgment, Brett, L. J., dissents. The contract as stated by Bagalley, L. J., is susceptible of three constructions: 1. That relied on by the plaintiffs, that, unless he elected to take all in November, the contract was for equal portions in three months. 2. That relied on by the defendant, that the plaintiff was bound to make his election in November, and communicate it to the defendant, in order that the defendant might be able to deliver the whole or one-third, as the case might be, in that month. 3. An alternative suggestion by the defendant, that the plaintiff was to take the whole 2000 tons in November, unless he gave notice to the defendant that he elected to have the cargo delivered in three equal portions. Bramwell and Bagalley, L. JJ., concur in holding the second view of the contract to be the true one, and that in that or the third view the plaintiff had no case. But for the sake of argument, they take the plaintiff's construction, and even then, following Hoare *vs.* Rennie, their judgment is the same; Lord Bramwell admits, however, as the authorities compel him, that if the *second* delivery and not the *first*, had been refused, there would have been no right to rescind. He goes on to say somewhat mournfully, "Suppose the November delivery would have been a profit to the defendant, and the December and January deliveries a loss, why is he to bear the loss and have no security that he will get the profit? This reasoning would, no doubt, apply where there is part performance, but then there is no help for it. It is asked whether every trifling breach of contract is attended with this consequence. I know not. But 666 tons out of 2000 are not a trifle." He concludes with the remark, that in such a case the buyer does not buy any parcel of 666 tons, any more than where a suit of clothes is sold there is a separate sale of coat, waistcoat, and trousers. The vigorous and logical dissent of Brett, L. J., will repay careful perusal. And the whole case, carefully read, will be seen to be against the principal case, the concluding remark of Lord Justice Bramwell, just quoted, evidencing the entirely erroneous view held by him. Surely it requires no argument to show the difference between the purchase of trousers, coat and vest, together forming a *suit*, and the purchase of iron, as in the principal case, or even in Houck *vs.* Muller, where the plaintiff's position was weaker. Hoare *vs.* Rennie, the reliance of the court, has been said to have the "weight of authority largely opposed to it" in the notes to Cutter *vs.* Powell (Russell, Q. C., arg., L. R., 7 Q. B. D., 97). See also, 15 Am. L. Rev., 687, for the true ground, we may say the only ground, on which Houck *vs.* Muller can be sustained, namely, that of prospective refusal, or complete breach by anticipation.

Coming now to this side of the Atlantic, we find it stated by Mr. Parsons (2 Contracts, *517) that, "If the part to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held severable; * * * but if the consideration to be paid is single and entire, the contract will be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." This statement has been judicially approved in several cases, and it is conceived to be a very correct presentation of the law.

The rule plainly deducible from the Pennsylvania cases is, that a partial failure to perform any part of a contract will not deprive a party of the right to recover for work already done under it, or for the refusal of the other party to continue it, unless the breach is one which goes to the entire consideration, and it is evident that the contract would not have been entered into except in view of complete performance. It is not the multiplicity of items in a contract which determines its severable or non-severable character; but it is its *object.* It has been held very frequently and with great reason, that the effect of a breach of a severable contract may be set off by the defendant in suits like the principal case, and deducted from the damages recovered, as such breach would manifestly give him a right to sue. But this is altogether different from preventing a party to a contract from recovering at all for work already done, or which he has offered to do, under the contract. No one is injured by this rule. The whole intent and purpose of the law in cases of this kind is to do exact justice between the parties; and if the loss occasioned by the partial failure can be recouped by the defendant, there can be no conceivable reason for allowing him to escape performance of his part of the contract. The case of Obermeyer *vs.* Nichols, 6 Binn., 159, is an early illustration of the point in Pennsylvania. In that case there was a lease of a mill, with a covenant on the part of the lessor to put up improvements. The improvements were not put up, but the rent of the mill was recovered nevertheless—the failure did not go to the whole consideration. The defendant was allowed to set off his loss by the non-erection of the improvements. The dislike to the idea of the exoneration of one party by the partial failure of the other, is strongly instanced in Ligget *vs.* Smith, 3 Watts, 331, where the plaintiff had agreed to build a warehouse and use certain mortar in its construction. Mortar was not used according to the contract, but it was held that this did not constitute an entire defense to an action *on the contract*, but that the defendant might set off whatever damage he had sustained. Of the later cases, Shinn *vs.* Bodine, 10 P. F. Smith, 182, is instructive. The contract was: "We accept your offer for 800 tons coal at $6.12½ per ton of 2240 pounds. Coal to be delivered as sent for during the months of August and September. Should we be unable to get all away by close of September, it is understood you can keep on wharf or bring down later, as you prefer, as much as 500 tons." One cargo was delivered under this contract, and payment therefor demanded and refused. The defendants then declined delivering any more coal, and the plaintiff then brought suit on the contract. The defendants requested the court to charge that the plaintiff's default in not paying excused them from further delivery. This was declined, on the ground that the consideration was entire, and there was no severance in it, and, therefore, the plaintiff was really in no default. Unless considered carefully, this case is liable to grave misinterpretation. It would seem to decide that *severable* contracts may be rescinded, and not *entire* contracts, whereas the reverse is certainly more nearly true as a general proposition. It will be observed that Shinn *vs.* Bodine was almost the converse of the principal case. Instead of a suit for a refusal to accept part performance of the contract on one side, it was a suit to recover damages for failure to continue performance on the other. The defendants claimed to rescind. Under Withers *vs.* Reynolds, 2 B. & Ad., 882, the plaintiff's conduct, had the contract been severable, would have amounted to a complete breach by anticipation, which, as noticed in Freeth *vs.* Burr, *supra*, gives the right to rescind even such contracts. But as the contract was entire, there being no evidence of severance in the payments, there was no breach by the plaintiff and, of course, the defendants were liable. The case is very far from deciding that, had there been a severable contract, and only a *failure* to make one payment, not a *prospective refusal* to pay at all, the defendants would have been excused from further performance. This is shown to be the true meaning of the case by the subsequent rulings of the same court. In Lucesco Oil Co. *vs.* Brewer, 16 P. F. Smith, 352, Parsons' statement of the law is approvingly cited. A very strong case is Morgan *vs.* McKee, 27 P. F. Smith, 228. Defendants bought 4000 barrels of oil from the plaintiffs, and eight similar papers of the same date were executed to them, each for the delivery of 500 barrels a month, cash on delivery. Plaintiffs, on demand, refused to deliver the oil on one of the appointed days. The defendants, on the next day for delivery, gave notice of rescission on the ground of the previous default. It was held that the plaintiff might recover for the refusal of the defendants to accept and pay for the oil subsequently tendered at the appointed times. Mr. Justice Williams, in delivering the opinion of the court, pronounces the contract beyond question severable, and says that the plaintiffs' failure to deliver once did not exonerate the defendants from accepting and paying for the future deliveries, and did not, *per se*, end the contract, though it doubtless gave the defendants a right to recoup whatever loss the breach had occasioned them, and continues: "If it gave defendants a right to rescind, they should have exercised it promptly;" and decides against them on the ground that at all events they had waited too long. No matter what the contract, if the defendants intend rescinding, they must act promptly. It will be observed that the learned judge does not decide in express terms either for or against the right to rescind ; but it is conceived that the implication is against it. Even if a contract is entire, there must be reasonable diligence in exercising the right of rescission. And if the delay were the sole reason for the decision, the court were at useless pains to show the contract severable. The true meaning of the opinion is, that a partial failure of performance by one party does not, in such cases, release the other party from his obligations. See also the remarks of Mr. Justice Trunkey, in Scott *vs.* Kittanning Coal Co., 8 Norris, 232, 238. Graver *vs.* Scott, 30 P. F. Smith, 88, clearly indicates that, in the absence of proof of the interdependence of the parts of such a contract, it will be considered severable, and, therefore, a breach will not excuse the other party from further performance. See also Stoddart *vs.* Smith, 5 Binn., 355. Quigley *vs.* De Haas, 1 Norris, 267, decides that contracts of this nature are *prima facie* severable, but that where it can be shown that such was not the intention of the parties, they will be construed entire.

Cases in other States bear out the same doctrine. We may refer in New York to Snook *vs.* Fries, 19 Barb., 313. The agreement was for the manufacture of several thousand bricks during the season of 1853, at so much per thousand, to be paid for as fast as burned. After burning one kiln, plaintiff deliberately abandoned the contract, and sued for what he had done. The defense was, that the contract had been *abandoned;* it was held that this did not end it, but that the defendants might bring a cross-suit. So that while the contract subsists, either party may recover upon it for performance, and by necessary implication for an offer to perform, being in turn liable to account in damages for partial or defective performance. So in Swift *vs.* Opdyke, 43 Barb., 274, where the agreement was by parol for twenty-two bales of blankets expected to arrive in two shipments, of eight and fourteen respectively. Seven bales arrived, were delivered, and suit was brought for their value. The plaintiff recovered. The contract was held to be severable, and it was said that to justify the other construction the inference must be unmistakable—it would impose on the plaintiff a heavy forfeiture. And in Talmage *vs.* White, 3 Jones & Spencer, 218, we find the following language : "If one order three parcels of goods at a certain price, and one be sent and accepted, he cannot refuse to accept the others, it stamps the contract as *several for each parcel.*" This principle, which it is conceived the cases abundantly bear out, is in direct conflict with the principal case. It clearly shows that the contract there was "several for each parcel," for by its very terms it is just such a contract. The various shipments were to be severally accepted and paid for. In Tipton *vs.* Feitner, 20 N. Y., 423, Judge Denio, in delivering the opinion of the court, said : "The position that one who has violated a contract on his part cannot recover for the breach of any of his stipulations by the other party, cannot be sustained." He then distinguishes cases where the consideration is evidently entire in the minds of the parties, and further remarks : "The law no doubt intends to discourage people from breaking their engagements, but this is not generally accomplished by visiting them with a penalty beyond the damages sustained by the party injured." See also, in New York, Pattridge *vs.* Gildermeister, 1 Keyes, 93. Lee *vs.* Bebee, 13 Hun, 89; Sickels *vs.* Pattison, 14 Wend., 257.

The law in Massachusetts is well illustrated by the two cases of Newton *vs.* Winchester, 16 Gray, 208, and Winchester *vs.* Newton, 2 Allen, 492. The same parties were concerned in both cases. The facts were as follows: On 27th May, 1857, the plaintiff, in the first case, agreed with the defendant, in writing, to deliver all the oak timber standing on certain wood lots prior to April 1st, 1858, at $6 per cord. Payments, six months after delivery. By an endorsement on the agreement, the plaintiff, in February, 1858, at the defendant's request, agreed to postpone until April 1st, 1859, the delivery of all the timber, "excepting what is now put on cars, being four carloads, and about ten cords at Marlborough depot, which is subject to the depot master's order for delivery," and also "about thirty-five cords cut." The four carloads, &c., were duly delivered, and in October part of the price was paid. None of the rest of the lumber was ever delivered. The suit was brought in February, 1859, to recover the balance of the price of the delivered lumber. The defense was, that nothing was due until all was delivered. The court thought otherwise, and gave judgment for the plaintiff, holding that the original, entire contract was severed by the endorsement. In the second case, the position of the parties was reversed. Before the commencement of the former action, Winchester had notified Newton that he would pay no more until the entire contract was fulfilled. After receiving this refusal, Newton delivered no more timber, and the present action was brought to recover for his failure to do so. The judgment was for the plaintiff, the court holding that the contract was severed as before. It was said in the opinion of the court that, "In regard to each portion a distinct liability attached to the parties." The doctrine of Withers *vs.* Reynolds was shown to be that of prospective refusal, and it was said, finally, that "The refusal to pay for the timber that had been delivered on October 1st, 1858, did not operate to discharge the other party from his promise to deliver timber April 1st, 1859." And in the opinion of the court in Miner *vs.* Bradley, 22 Pick., 459-60, there is a very clear indication that such a contract is practically made up of several and distinct agreements.

In Maine, the case of Dwinel *vs.* Howard, 30 Me., 258, cited by the defendant in the principal case, demands special attention. The defendants agreed to deliver to the plaintiff all the ice at certain places at so much per ton. Payment, $500 on the execution of the contract, to be applied in payment for the last ice received. Balance, one-half in thirty, one-half in sixty days. Or, if any of the ice was taken away sooner, cash on delivery. The "sixty days" payment not having been made, both before and after it fell due the defendants refused to deliver any more unless paid cash for it. Part of the ice remaining undelivered, the plaintiff sued on the contract for damages. The judgment was for the defendant, on two grounds: 1. That they had a right to insist on cash payment, and were not bound to continue delivering when it was refused. 2. That even if they had by their former deliveries waived this right, the plaintiff, to be entitled to exact performance of the residue, should have paid the price within sixty days as agreed. The case is so plainly distinguishable from the principal case that extended comment is unnecessary. In the first place, it is very questionable whether the contract was not entire; and in the second place, by its very terms, payment was to be cash on delivery, or absolute within a certain time; and there was no evidence of willingness on the part of the plaintiff to pay in either way. So in Haines *vs.* Tucker, 50 N. H., 309, where the judgment was put upon the express ground that the refusal to accept the malt was unqualified and a clear renunciation of the contract; in the course of its opinion the court says: "If, on the trial, the jury should find that the refusal of the defendants did not amount to a renunciation of the contract by them, and that what occurred on that day, together with the defendant's previous conduct, was not sufficient to justify the plaintiffs, as reasonable men, in the conclusion that the defendants did not intend to fulfill, and would not do so, then it would be necessary for the plaintiffs to hold themselves in readiness to perform, and a further performance might perhaps have been required." In Tyson *vs.* Doe, 15 Vt., 571, it is said that, "So long as a contract by its terms remains executory, it may be rescinded, or put an end to, in various ways. This may sometimes be done in virtue of a right expressly reserved to one party alone, or to each of the parties. So the contract may be subject to some express or implied condition, the non-performance of which will annul it, at the election of the party entitled to insist on the condition." See also, in that State, Keenan *vs.* Brown, 21 Vt., 86; Gallup *vs.* Burnell, Brayt., 191; Taylor *vs.* Gallup, 8 Vt,. 340; Fletcher *vs.* Cole, 23 *Id.*, 114. So also, in New Jersey, the question of a vendor's right to rescind was held to depend upon whether a contract is or is not entire: Thompson *vs.* Conover, 3 Vroom, 466. In North Carolina, there is the case of Homesley *vs.* Elias, 75 N. C., 564, where it is said that the plaintiff might have rescinded; but there was a prospective abandonment of the contract by the defendant. In Alabama, the tendency is against the principal case: Kirkland *vs.* Oates, 25 Ala., 465; Drake *vs.* Goree, 22 *Id.*, 409, 415. And in Mississippi it is held that a failure of a party to comply with a portion of the stipulations of an agreement is no ground for a rescission of the whole contract, so as to deprive him of rights secured to him by the other provisions contained in it, and which are wholly independent of those in which he has made default: Dunlap *vs.* Petrie, 35 Miss., 590. In Kentucky, the cases of Trimble *vs.* Green, 3 Dana, 357, and Hewitt *vs.* Berryman, 5 *Id.*, 165, serve well to illustrate the law. In the former, a case of condition precedent, where the consideration was a *covenant* and also a performance, it was sought to maintain that, the performance not going to the entire consideration, but the covenant forming part of it, the failure to perform might be recouped in damages. But this view was not satisfactory to the court. It was held that the performance was a condition precedent to recovery, and that without it in such cases, there could only be a recovery where the defendant had received some benefit which it would be inequitable to allow him to retain; and Pordage *vs.* Cole, or rather the notes to it, the court criticises and disapproves. But in Hewitt *vs.* Berryman there was one contract containing several stipulations, and the following language is used by the court: "Though the contract between Hewitt and Felix is one and entire [this word is not used technically here], it contains several distinct and independent covenants on the part of each, which are not made to *depend* upon the performance of the whole of the covenants in the entire contract, on either side." It is added, that if suit had been brought for the breach of one stipulation, it surely would not be contended that the plaintiff must aver performance of all his part of the contract. All that is necessary is the performance of what relates to the particular act in question. The Iowa cases are to the same effect: Dibol *vs.* Minott, 9 Iowa, 403; McDaniels *vs.* Whitney, 38 *Id.*, 60. Robson *vs.* Bohn, 27 Minn., 333, 346, closely resembles Dwinel *vs.* Howard, *supra*, and serves to explain it, as above. Nothing could be more explicit than the language of the court in Sawyer *vs.* Railroad Co., 22 Wis., 403. It is not necessary to recite the facts of that case; they are not in point, although the question under discussion was involved. The court says: "Was such delivery and receipt of payment a waiver of the condition of payment down for the first hundred barrels according to agreement? Did the plaintiff thereby ratify the entire agreement, so that he could not afterwards rescind as to the one hundred barrels of which Mr. Tilton had thus obtained wrongful possession? * * * I think the plaintiff waived none of his legal rights (arising out of the wrongful delivery or taking of the first one hundred barrels). I think so, because I think the agreement divisible. It was for the sale of 300 barrels of flour at $8, in lots of 100 barrels, cash on delivery. *It was in legal effect the same as if there had been three contracts for the sale and delivery of one hundred barrels of flour each.* See also, in the same State, and to the same effect, Goodwin *vs.* Merrill, 13 Wis., 658. The court said in Allen *vs.* McKibben, 5 Mich., 454, "Where a party fails to comply substantially with his agreement, *unless it is apportionable*, the rule is well settled that he cannot sue upon the agreement or recover upon it at all." And in Norris *vs.* Harris, 15 Cal., 227, it was held that the partial failure of performance of a severable contract did not entitle the other party to a rescission of the whole contract—parts of it might be rescinded which were entire in themselves. (See pages 256-7.) And it has been held in many cases besides those already cited, that a contract of this kind is practically made up of several distinct agreements: Coleman *vs.* Hudson, 2 Sneed, 463; Cole *vs.* Cheovenda, 4 Col., 17; More *vs.* Bonnet, 40 Cal., 251; Purdy *vs.* Bullard, 41 *Id.*, 444; Loomis *vs.* Bank of Rochester, 10 Ohio St., 327; Kennedy *vs.* Schwartz, 13 Nev., 219; Dugan *vs.* Anderson, 36 Md., 567. An important point to be observed is, that where the contract is severable, recovery is allowed *on the contract*, not on a *quantum valebat.* As to when the latter, an implied contract, can be sued upon in such cases, there seems to be some little differences among the authorities, but the rule may, probably, be stated as follows: Where the contract is entire, and a benefit has been received under it, if one party break it he may still recover on a *quantum valebat*, a new contract being implied from the retention of the benefit, and the measure of damages being no longer the original contract price. The original contract is destroyed by the breach ; but this is not true of a severable contract, and, therefore, the recovery is upon the contract itself. As to *quantum valebat*, see cases already cited, and Liggit *vs.* Smith, 3 Watts, 331. Also, notes to Cutter *vs.* Powell, 2 Sm. Lead. Cas., 18. It only remains to notice the few cases which sustain, or seem to sustain, the principal case. They are Bradley *vs.* King, 44 Ill., 339 ; Catlin *vs.* Tobias, 26 N. Y., 217 ; Smith *vs.* Lewis, 40 Ind., 98, and King Philip's Mills *vs.* Slater, 12 R. I., 82. The first case, carefully read, will be seen to have been one of prospective refusal. The terms were cash on delivery of each parcel, and the vendee accepted a parcel and refused to pay cash for it ; and this refusal was based upon a claim to set off damages caused by a previous default of the vendors. So that it was a denial of the obligation to pay, and comes within the principle of Withers *vs.* Reynolds, viz., that of breach by anticipation. Besides, a late case in the same State, decided last year, denies in express terms the right to rescind in such cases : Hime *vs.* Klasey, 9 Bradd. App., 166 ; S. C. *Id.*, 190.

Smith *vs.* Lewis was clearly an entire contract, so held by the court, and for that reason decided as it was. The opinion of the court plainly implies that had the contract been several the result would have been different. The *object* of the contract was single, and the fact that there were separate items was wholly unimportant.

Catlin *vs.* Tobias is an admirable instance of the rule that the intention of the parties is to govern. The contract was for the delivery of a certain quantity of bottles from time to time, the vendees being manufacturers of medicine. Either party, on failure to perform, was to pay a forfeit. Nothing was said as to the time of payment, but from the evidence it appeared that it was to be after all the deliveries were made (page 222). It was held, that the evident intention of the parties was that the contract should be performed in terms, as it was doubtless made by defendant with a view to his requirements in business, *i. e.*, bottling his medicine. The suit was for a single delivery, and that imperfect, and the court said, that conceding it to be a series of separate contracts, the delivery being incomplete could not be recovered on. The referee and court below had held that there were, practically, several contracts, and as a general proposition they were supported fully in this by Seymour *vs.* Davis, 2 Sand. S. C., 239 ; Deming *vs.* Kemp, 4 *Id.*, 147. The last page of the court's opinion (page 223) is very instructive, and shows the way in which this particular contract was regarded, namely, that it was one in which the parties evidently contemplated full performance.

Lastly, the case of King Philip's Mills *vs.* Slater, is directly in point and is entirely in accord with the principal case. But it is supported only by Hoare *vs.* Rennie, *supra*, itself unsupported, and the court says in the course of its opinion : " But it is difficult to reconcile the cases, especially the older ones, to our notions of justice." The learned court might well have substituted "impossible" for "difficult." Other cases might be cited in conformity with the authorities given above; but it will suffice to refer, in concluding the question of authority, to the instructive opinion of the court in The Maryland Fertilizing Co. *vs.* Lorentz, 44 Md., 218, and to the brief of argument for the appellees in the same case.

And now as to the wisdom of the rule that the decided weight of authority seems to establish, namely, that rescission will not be allowed of the whole contract except where the breach goes to the entire consideration. It is a familiar principle of law, that forfeitures are never favored. And there can certainly be no clearer instance of forfeiture, than the loss of an entire bargain because of a breach which has no real effect but upon a small part of it. It is really quite impossible to draw any valid distinction between an agreement like that in the principal case, where there were to be successive deliveries, separately and independently paid for, and a series of distinct agreements on different pieces of paper. As noticed before, each little agreement is complete in itself, and may be rescinded for a breach which destroys it; but to enforce a forfeiture of all the similar agreements for a breach of one is to extend to forfeiture the greatest possible favor. It is perfectly competent for parties to embrace in their contract an express provision for rescission, and this is very frequently done. But it is certainly not consonant with the established policy of the law to *imply* a condition precedent, the breach of which shall work a forfeiture far beyond the damage caused. Whatever damage such breach does cause, the injured party must of course be compensated for; and that is all he can reasonably ask. Few contractors willfully neglect to carry out their contracts. It would be the worst possible policy. But in large undertakings of this kind unavoidable accidents are apt to occur, and it would, as it seems to me, be monstrous to make a slight deviation from exact performance an opportunity for the other party to annul the bargain at his pleasure. To *imply* such intention is to credit the vendors with most unbusinesslike rashness.

It is impossible to deny the logic of the opinion in the principal case. It is certainly more accurate to call these agreements "transactions" than "contracts"; but as has been well said, there is no magic in words. And it is conceived that principle and the authorities will hardly warrant the Supreme Court in sustaining the decision.

LUCIUS S. LANDRETH.

PHILADELPHIA.

115-188

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JAN 28 1885

JAMES. H. McKENNEY,
CLERK

No. 176. **October Term, 1884.**

In the Supreme Court of the United States.

NORRINGTON

vs.

WRIGHT.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PLAINTIFF IN ERROR.

SAMUEL DICKSON,
J. C. BULLITT,
For Plaintiff in Error.

Allen, Lane & Scott, Printers, 229-231 South Fifth Street, Philadelphia.

In the Supreme Court of the United States.

Norrington vs. *Wright.* } October Term, 1884. No. 176.

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PLAINTIFF IN ERROR.

First.—As to the excess or deficiency covered by the word "about."

Where an assignment was made "in trust to pay the debts due the following persons, viz. :" and then followed the names and debts, and a debt due one creditor was put down "about $11,000," which was in fact upwards of $13,000, held that the trust included the latter sum.

Brown *vs.* Weir, 5 S. & R., 401, 402.

"It has been urged as a reason for a new trial, that the word "about" did not authorize so great a latitude of construction ; because other creditors of William Smiley might have been induced to execute a release to him (the terms of the assignment requiring a release, before any creditor should be entitled to a dividend), on the supposition that Liberty Brown's debt amounted to no more than $10,000. But upon full consideration of the instrument of assignment, it is the opinion of the court that Liberty Brown's debt upon the face of the writing appeared to be not exactly limited to the sum of $11,000, but to be left open to further adjustment, and that the dividend was to be drawn upon the sum really due, whether more or less than $11,000. We do not mean that the amount was so indefinite as to reach to twenty or thirty thousand dollars, but that the sum now in contest is not an unreasonable excess. It is to be remembered that if other creditors executed releases so likewise did Liberty Brown, and it never could have been his intent to have his debt estimated at less than its real amount." Per Tilghman, C. J.

"The jury say they find for the plaintiff when it should have been for the claimant, John Baird. But this is not all. They find for him, 'wood and timber to the amount of about forty cords;' about forty, may be any quantity between thirty and fifty, and the constable can never tell which quantity is meant or what kind is intended without another jury."

Baird *vs.* Johnson, 2 Green, 120, 123.

Under a writ of replevin for about four hundred tons of bog ore, the sheriff is not authorized to deliver to the plaintiff seven hundred and twenty tons. It seems that the sheriff would have been justifiable in refusing to execute a writ thus vaguely describing the property.

DeWitt *vs.* Morris, 13 Wendell, 496, 498.

"About four hundred tons clearly does not mean seven hundred and twenty tons, nor does it mean five hundred tons. It may be construed to mean more than four hundred, but the sheriff would have been justified in limiting the quantity taken to an amount not exceeding that number; and this would have been not only the safest, but I think the soundest interpretation of the terms of the writ. All over four hundred and fifty at most was taken without any authority, and the sheriff and the party, if he directed or co-operated with him, are individually responsible. Any number of tons over four hundred and fifty would be about five hundred instead of about four hundred, and ought not to have been taken because not coming within the description." Per Nelson, J.

"An agreement to sell a 'cargo of old railroad iron, to be shipped per bark "Charles William," at thirty dollars per ton, delivered on the wharf at the port of discharge, dangers of the sea excepted, about three hundred or three hundred and fifty tons,' is complied with by a delivery at the port of discharge of as much as that vessel, if seaworthy and in good order, can carry, though only two hundred and twenty-seven tons."

Pembroke Iron Co. *vs.* Parsons, 5 Gray, 589.

"About two thousand quarters, say from eighteen hundred to twenty-two hundred quarters."

Tamvaco *vs.* Lucas, 1 Ellis & Ellis (102 E. C. L.), 581.

Second.—As to the right to tender the exact amount out of a larger parcel, as was done in the case of the April shipment.

"The defendant pleaded, thirdly, that the quantity of cotton in the declaration mentioned to have been purchased and shipped, and for the price of which, together with the said charges and commission, the said bill was drawn as in the said declaration mentioned, was a large quantity of cotton, more than and exceeding the said extent of two hundred bales, that is to say, the same amounted to two hundred and six bales, and this the defendant is ready to verify."

"Special demurrer to the third plea.

"The point stated on the part of the plaintiffs was that the plea did not contain any answer to the whole of the count which it proposed to answer.

"The defendants main point referred to the declaration as defective.

"Wightman in support of the demurrer. This is a demurrer to the plea; but it will be necessary in the first place to refer to the declaration. There is a double breach: first, that the defendant would not accept or receive the cotton or any part thereof, but that he neglected and refused so to do; and secondly, that he refused to accept the bill. The breach as to not giving the bill cannot perhaps be supported, as it was drawn for too large a sum; but the other breach, for not accepting or receiving the cotton or any part thereof, is sufficient. There is a distinct allegation that the defendant refused to accept or receive any part of the cotton; and he was clearly bound to receive to the extent of two hundred bales.

"*Sed per Curiam* (stopping Crompton, who was to have argued for the defendant). You do not show sufficiently in your declaration that the plaintiffs were ready and willing to deliver the two hundred bales only.

"Leave to amend on payment of costs."

Dixon *vs.* Fletcher, 3 Mees. & Wels., 146, 149.

Third.—As to the main question.

"The counsel of the defendant, however, contend that several of the provisions and requirements of the agreement were conditions precedent, the performance of which was necessary to entitle the plaintiff to proceed further with the work, and to claim the compensation provided for; and that he ought to have alleged performance of these conditions, or that the company prevented him from performing them; and they enumerate the following as their conditions precedent: (1) Subscribing for $150,000 capital stock upon the execution of the agreement; (2) beginning the work within thirty days therefrom; (3) having the piles of the pier driven by July 31st; (4) having the road ballasted and finished to the depot grounds at Lewes by the 1st of August. But I do not regard these engagements as conditions precedent, if they are conditions at all. They are not in terms made so by the parties themselves, and I cannot perceive any implied intent that they should be so. They stand simply on the agreement of the plaintiffs, for the breach of which he might be liable to damages if the defendant could show any damages resulting therefrom. If the plaintiffs' delinquency in this particular evinced an intention on his part to abandon the contract and not perform it at all, it would be evidence on that issue, and such abandonment would have authorized the defendant to have considered the contract as at an end, and to stop the plaintiff from further intermeddling with the road and pier. This is the result of the most recent authority, Mersey Steel and Iron Company *vs.* Naylor, 9 Q. B. Div., 688. It may be added that as to the subscription of stock the plaintiff has alleged that the company prevented him from subscribing, and the completion of parts of the work at particular times was necessarily a thing subsequent to the performance of a large part of it, but still only extended to a part and not to the whole consideration of the contract, being both circumstances on which courts often rely in construing a covenant not to be a condition precedent." Per Bradley. J.

Hambly *vs.* Delaware M. & V. R. Co., 21 Fed. Rep., 541, 544.

SAM'L DICKSON,
J. C. BULLITT,
For Plaintiffs in Error.

3

115-186

494 Oct. 1883

Norrington
v
Wright

Brief of Deft. in Error.

Richards & McMurdie
for deft in error

NORRINGTON
vs.
WRIGHT.

Error.
S. C., U. S., Oct., 1883.
494.

BRIEF OF DEFENDANT IN ERROR.

The contract (page 39 of Rec., the marginal pages of which are referred to) was made January 19th, 1880, for shipment of five thousand tons old rails, at the rate of about one thousand tons a month, but all before August, at forty-five dollars per ton, payable on landing. *Sellers to notify buyers of shipments with vessels' names as soon as known.*

The shipments being deliveries (contigent on arrival, the sellers having no further duty to perform), notification of names of vessels was a selection of these cargoes as the things tendered under the contract. Benj. on Sales, Sec. 588; Reuter *vs.* Sala, L. R., 4 C. P., Div. 239.

The action in this case was for not accepting the tenders of performance. The declaration treated the whole contract as *one,* and averred performance by shipping about one thousand tons in each of the months of March, April, May, and June, that for February having been accepted and paid for. The figures showing the mode of attempting to perform this contract will now be given. The shipments in each month as advised were as follows:

Shipment.	Ship.	Quantity.	
February,	per Snap, .	400 tons.	
Deficit, ...			600 tons.

Page 42, Record.

Believing the residue of this instalment had been shipped, this cargo was paid for on arrival. Record, pages 28, 29, 30, 31, 32.

Shipment.	Ship.	Quantity.	
March.	Hazlewood, .	450 tons.	
	Marianna IV., .	435 "	
		885 "	
Deficit, ...			115 tons.

Page 43, Record.

April.	Holmstrand, .	550 tons.	
	Marianna 2d, .	250 "	
	Colombo Carolina,	550 "	
	Philip Fitzpatrick,	141 "	
	Molilamo, . .	80 "	
		1571 "	
Excess, ...			571 tons.

Pages 44–45, Record.

May.	Anna and Marie,	200 tons.	
	Europa, . .	150 "	
	Alfen, . .	500 "	
		850 "	
Deficit, ...			150 tons.

Pages 44–59, Record.

June.	Nimbus, . .	500 tons.
	Ranger, . .	500 "
		1000 "

Page 60, Record.

July.	JedanesteDubrovacki,	300 tons.

Page 63, Record.

The objection to the proposed mode of performing the contract was taken immediately on the discovery of the failure to ship as stipulated. Record, page 28.

"We first ascertained the dates of the shipments on receiving his letter in reply to ours of May 6th.

"On the 14 May, we wrote declining to accept." See page 46 for the letter.

The memorandum giving the dates of the shipments in reply to the request of May 6th, which was produced and referred to by the witness, page 28, was omitted from the bill of exceptions, but has been added to it by consent. It is without date, and the witness describes it as a paper delivered after the 9th and before the 14th of May.

After this there were attempts to vary the tenders and to treat the naming of the vessels as immaterial. See the plaintiff's agent's letter, June 15th (page 58, Record).

It may be deemed important to see what were the proposed changes, if they had been permissible.

This is a tabular statement of the shipments as originally notified and afterwards attempted to be modified:

Shipment.	Ship.		Quantity.
February.	Snap, ...		400 tons.
March.	Hazlewood, .	450 tons.	
	Marianna IV., .	435 "	
			885

April.	Holmstrand,	550 tons.	
	Marianna 2d,	250 "	
	Colombo Carolina,	550 "	
	Philip Fitzpatrick,	141 "	
	Molilamo,	80 "	
			1,571 tons.
Withdrawn,	P. Fitzpatrick,	141 tons.	
	Molilamo,	80 "	
			221 "
			1,350 "
May.	Anna and Marie,	200 tons.	
	Europa,	150 "	
	Alfen,	500 "	
			850 tons.
Withdrawn,	Europa,	150 tons.	
	Alfen,	500 "	
			650 "
			200
Substituted,	Winifred,		900 "
Excess,			100 "
June.	Nimbus,	500 tons.	
	Ranger,	500 "	
			1000 tons.
	Jedaneste Dubrovacki,		300 "

The real point of the case is, whether on *the pleadings* the plaintiff had made out a case by his proofs.

Had he proved his averments of readiness and willingness to perform the contract as he, himself, averred it to have been made?

1. The plaintiff contended at the trial (page 37 of the Record) and may contend here, that the contract meant that he had six months to ship in, and that the only effect of the clause relating to the severance of deliveries, was that the defendant could not be compelled to *accept* more than one thousand tons in any one month.

2. That the only remedy for his default, if the contract required shipment of one thousand tons in each month was a deduction of the damages for any failure. It is supposed this is *the* point intended to be pressed.

The first point assumes that the stipulation for shipment is absolutely immaterial, and is converted into a stipulation for actual delivery not exceeding one thousand tons a month.

But there is no stipulation on the subject of delivery in the contract other than by shipping. Such a stipulation would have been mere folly, for how would it be possible to determine when vessels sailing from Europe would arrive.

It is sufficient, however, to say the stipulation makes no reference to *deliveries* but to *shipments*, and if it is intended to say the shipments were the deliveries, as they certainly were, their arrival being only important to fix the time for paying, then the contract reads, as we contend, that the plaintiff will deliver about one thousand tons a month by shipping that quantity in that space of time, and the duty to receive is to receive these and not any less or greater quantities, nor anything not thus delivered within the periods agreed on. Bowes *vs.* Shand, 2 Appeal Cases, 480, decides: "These words describe the subject of the sale, so that it is the cargo shipped in accordance with the contract that is alone the subject of the sale." And this is the ground there taken by Ld. Blackburn.

And it is equally clear that this stipulation could by no possibility refer to the conduct, act, or duty of any one but the shipper. It is the well-known and the only known mode of deciding the *probable* time of arrival, and hence the probable time for being required to pay, that can be devised for such transactions (see the remarks of Ld. Cairns in Bowes *vs.* Shand, L. R., 2 Appeal Cases, page 463. And that this meaning is also that of Merchants, see Ld. Hatherley's remarks, page 473).

The second contention I submit, and shall presently endeavor to show, cannot arise in this case, because it was not raised by the pleadings. This point was taken at the trial, see Record, page 37. *The defendant contended that the evidence does not prove the averments of the first, second, third counts,* and the fourth was abandoned.

After the notice of the 14th May of the refusal to accept the goods, the plaintiff had the right to take the defendants at their word, and treat the contract as terminated (Benj. on Sales, s. 759; Hochster *vs.* De LaTour, 2 E. & Bl. 678), and under the theory of that case the damages should be ascertained as of that day, and, as it is a breach, it is difficult to say some other time must be taken for this purpose.

But to produce this effect the plaintiff was bound to acquiesce and treat this as a breach, and to do so, he must elect to treat this as an abandonment and act accordingly. Benj. on Sales, s. 759*a*, and the remarks of Brett, J., there quoted.

If he had done this, the question would have been solely on the right of the defendants to rescind, or abandon, the contract.

But the plaintiff elected, as he had the right to do, to hold to the contract, and insist on performance, if this repudiation was unlawful. Benj. on Sales, 759, 759*a*.

In doing this he must of necessity treat the attempt to disavow as unauthorized, and the contract as remaining in full force; and then the question is, did he so perform, or offer to perform, his contract as to render the defendants liable for refusing to accept?

The declaration (page 6, Record) is on a contract for the sale of *five thousand tons old T. rails, to be shipped at the rate of about one thousand tons per month.* Thus describing the contract so as to exclude the first point, if it could have been otherwise so stated as to raise it. It then avers performance on his part thus: "*The plaintiff, in the months of February, March, April, May, June, and July, did ship the goods at the rate of about one thousand tons per month.*" The breach is non acceptance, so that the only point was, had the plaintiff complied with his contract, so that the refusal to accept was not well grounded?

The second count sets out the contract verbatim, and avers performance in the same words as in the first count, and the question is the same. The third count is identical with the second, except that it avers the shipment of the cargo of the "Snap" in February and its acceptance, and avers the shipment of the residue in March, April, May, June, and July, at the rate of about one thousand tons per month.

This raises the same point, but is liable to the further objection that there was no such contract as that here averred. For it is plain that the stipulation for the right or duty to ship in the sixth month (July) was intended only for those portions which the plaintiff might be permitted to have failed to ship in the five months of February to June, inclusive.

The fourth count was abandoned (see page 37, Record). The evidence has been referred to, and shows that in February there was a deficit of *sixty* per cent.; in March, *eleven and one-half* per cent.; in April, an excess of *fifty-seven* per cent.; in May, a deficit of *fifteen* per cent.; and it was only in June that there were shipments that were a compliance with the contract as to quantity, and these were made in June (see letter to defendant, July

10th, page 60, of Record), more than a month after the plaintiff knew the contract had been abandoned for his default.

The questions here, upon this declaration, are

1. Was the plaintiff's averment of performance proved so as to create a liability, there being no dispute, but that such an averment was essential to create a liability under the contract?

2. Can the plaintiff, having elected to sue on the contract as he has done, recover for the price upon such proof as he gave of performance, and require the defendant to deduct any damages for his failure to perform as he agreed and as he avers he has done, and also exclude him from electing to treat the contract as abandoned for the plaintiff's default in February?

As to the first—it can hardly be required in this Court to produce authorities that an averment of performance by shipping *about* one thousand tons in each of the months of February, March, April, May, and June, is not proved, by proof of a delivery
in February of 395,
and of shipments in March of 897,
in April of 1570,
in May of 849,
in June of 992,
and in July of 306.

I will cite one only: Benjamin on Sales, section 689. *The seller must tender the exact quantity, neither more nor less.*

2. It may be conceded he can elect which ever of several ways the contract may operate, but when he elects he is bound to treat it as operating in that way. Thus, where the bond is joint and several declaring on it as joint, discharges a party dying after suit, because of such election. Walter *vs.* Ginrich, 2 Watts, 204.

He is not permitted to aver the contract to be in legal effect one thing and seek to treat it as another on the proof. He has elected to treat this as one contract, one sole cause of action and one breach. He is bound to plead it as he intends to use it. Bushel *vs.* Beavan, 1 Bingh, N. C., 120; Hallett *vs.* Dowdal, 18 Queen's B., 81. If it differs from this it is a variance. Kearney *vs.* King, 1 Chitty, 28.

But assuming he had elected to treat the contract as severable, how was this to be done? Certainly, by declaring on each instalment as a distinct subject of action. And in doing so he must have proved each count as if it had been on a separate contract. But he has not done this; he has sued on the contract as one entire cause of action.

The main point proposed to be raised, and which was endeavored to be raised in the Court below, did not therefore arise and could not be raised on this record.

That was his second proposition, viz.:

2. That because the contract was divisible, the purchasers were bound to accept the deliveries as tendered, and could not treat the contract as abandoned, because of the failure to ship in February, but were compelled to accept whatever the sellers saw fit to ship in any month, and their only remedy for any failures to ship according to the contract was by set off or by cross action.

The defendants contended:

1. That the failure in February dissolved the contract at their option if exercised as soon as known.

2. But if this were not so, there could be no recovery on any instalment because of non-performance on the part of the plaintiff as to that instalment.

3. That on the pleadings the contract was treated as one, and as performance or readiness to perform was confessedly material, and was averred, the plaintiff could

not recover, because his proof showed there had been no performance by him, nor any tender of performance.

The plaintiff's contention rests on:

1. An entire disregard of the case made by the pleadings. These have been stated. His proof was neither in accord with his averment nor with the contract.

2. The contention also rested on an entire misapprehension of the rule known as that of Simpson *vs.* Crippen, or rather on an assumption of a rule that has never existed.

That case was supposed to rule that divisibility on the contract rendered immaterial—

1. Performance of the earlier instalment.

This under the new English rule is correct, so far as treating such performance as a condition precedent *to the continuance of the contract in force against the intention of the party defaulting.*

2. But the rule was also supposed to make performance by the seller of those parts of the contract sought to be enforced, at the times and in the quantities stipulated, unnecessary to enable him to recover the price of *those* instalments.

It was contended that the seller could tender less or more within the times appointed, and recover the price, leaving the purchaser to a set off or cross action for any failures of the seller.

There is not even color of authority for this proposition. The modern English rule has deprived the purchaser of the right to treat a divisible contract as dissolved by a failure to perform one instalment, unless such failure indicates an intention not to perform the rest.

No one has ever said, much less has any case decided, that the rights and duties of the parties as respects each instalment, differ from what they would be if the instalments were the subjects of distinct contracts.

The reverse was held in one of the cases that carried the rule so far as to say, divisibility splits the contract into as many separate contracts as there are divisions for performance. Brandt *vs.* Lawrence, 1 Q. B., Div. 344.

There after deciding that performance of one instalment was not a condition precedent as to subsequent instalments, the court decided that a purchaser was not bound to accept any shipments if not made within the time stipulated.

The discussion in England of the right to rescind or abandon is probably terminated by Mersey *vs.* Naylor, 9 Appeal, 434.

The question was, what is the effect of an omission to pay for an instalment under a contract like the one in the present case.

It is there agreed, that the contract is not *divided*, but is *one*.

2. That a failure in respect of one instalment, does not entitle the other party to treat the contract as abandoned, unless the failure shows an intention not to comply.

3. Then the failure may be treated as an abandonment for the same reason that a notice before the time appointed, that the party will not comply, may be so treated.

There is no reference or allusion to any other effect on the residue of the contract than that it remains in force unaffected by the previous default.

That there was no intention to intimate that the rules governing the residue were changed, is very clear; *i. e.*, it was not intended to say that a seller could tender less or more than was required by the contract, or at a different time. Or that he could be compelled to deliver without payment. There is no suggestion or intimation of any intention to lay down such a rule.

This is shown by—

1. The absence of all reference to that question.

2. The question did not arise, and anything more than a dictum would have been impossible.

3. And the Ld. Ch. declined doing more than deal with the case before him, which was simply this—is the payment for the first instalment a condition precedent to the obligation of the contract continuing in force.

The recognition of Houck *vs.* Muller, is inconsistent with an intention to lay down such a rule, for it would require the rule there laid down to be overruled.

The contract in that case was one deliverable either as a whole in November, or in three equal monthly parcels, in November, December, and January.

November having passed without any delivery, as none could be made according to the terms; the sellers were held, not bound to accept two-thirds in December and January, though that would have been a good performance if one-third had been delivered in November.

No one intimates that this is inconsistent with the point decided in Mersey *vs.* Naylor. One judge puts Houck *vs.* Muller on the ground that performance had become impossible. Thus showing that it was never meant to alter the rule that required performance of the whole before the price can be demanded.

Another said that it and the other kindred cases had no bearing on the point raised in Mersey *vs.* Naylor.

I have been unable, and I think it is impossible, to find a case in the English reports which allows any variation from the stipulated terms of performance of each distinct instalment.

Reuter *vs.* Sala, 4 C. P., Div. 239, is express on this point There the contract was divisible at the option of the seller. He could send by one or by several ships. He was bound to notify the names of the ships and he did notify that the shipment had been made by one ship. The decision was, he can not after that notify partly by the same ship and partly by another, and that the purchaser was not bound to accept so much of the goods as came by the vessel notified, as it was only twenty out of twenty-five tons.

The ground for supporting Brandt *vs.* Lawrence there suggested, proves this to be the recognized rule. It is that, as the partial shipment was a proper delivery at the time it was made, it did not cease to be a good delivery because the whole instalment was not shipped in time. It was necessary to show why a partial delivery *could be good*, and this extremely nice distinction was resorted to.

That is contrary to the rule of Oxendale *vs.* Wetherill, 9 Barn. & Cress., 388, decided in 1829, by Baron Parke; but it shews that no English court has ever supposed that a tender which at the time it was made was not in accordance with the terms of the contract, could be a good performance, because the contract is divisible.

I shall presently call attention to the inconsistencies of this rule, with their own decisions. At present I wish to shew that whether right or wrong, the rule does not touch this case.

That being the English rule, could the plaintiff recover under that rule either,

1. On the issue as raised by the pleadings; or

2. Assuming the plaintiff had stated his case in any possible way, could he under this contract have recovered for any instalment without averring and proving a shipment of about 1000 tons in the particular month and its arrival.

Then would his proof sustain, that—

Under a	contract	to deliver in	March,	1000 tons,	885	is a good delivery.
"	"	"	April,	"	1571	"
"	"	"	May,	"	850	"
"	"	"	June,	"	1000	"

In July for deficits in prior months, which could not exceed 5 per cent. on the whole quantity of 5,000 tons, which would be 250 tons, he tendered 306, and there is no allusion to this in the declaration.

Is this rule as laid down in Mersey *vs.* Naylor to be adopted.

1. Consider the objections to it as a practical rule. *a.* Why is it that exact performance at the time, in the manner, and of the quantity is exacted, and does not every reason for allowing the purchaser to refuse to accept any variation of performance apply? *b.* Why has it always been and still is the rule, that the seller or purchaser cannot be compelled to accept any variation and set off, or sue for the failures in case of indivisible contracts? It is not merely because of a rule known as conditions precedent, but because it is essential that men should know certainly when they are bound and when loosed. Is it not quite as essential to the purchaser of 100 tons a week for one year, as to a purchaser of 100 tons deliverable on Monday, to know on Tuesday whether he is liable for 4900 for the rest of the year, as whether he is liable for the 100.

Apply it to any contract for continuous supplies—bread, milk, meat, or for services—coachman, clerk, watchman, and it really is absurd to say that the purchaser or employer is liable to be compelled to accept and pay on whatever days it suits the seller to deliver, or for the servant to tender services, and his redress is only by set off; and if he engages another supply or another servant, he may be compelled to accept and pay for twice the quantity or double the services he wants.

2. It is a confessed novelty.

Its real origin is Simpson *vs.* Crippen, decided in 1872, L. R., 8 Q. B., 14, which overruled Hoare *vs.* Rennie, 5 Hur. & Norm., 19, decided in 1859, and which was reaffirmed in Houck *vs.* Muller, 7 Q. B., Div. 100, in 1881. Whether the formula adopted in Mersey *vs.* Naylor is consistent with one or the other, I will not venture to determine. There is confusion I think, and that it is explained in this way. The new rule suggested in Simpson *vs.* Crippen was the result of a mistake, and it was adhered to so long that it was too late to eradicate it, when Mersey *vs.* Naylor was argued. It has been retained at the expense of principle, and because in many of the cases enforcing accurate rules will apparently work hardship.

3. It originated in a mistake.

It was first rested on the rule of Pordage *vs.* Cole. In Houck *vs.* Muller, this was demonstrated to be an utter mistake, and it was confessed to be so by one of its maintainers. Then it was rested on the doctrine of the notes to that decision in Williams ed. of Saunders, 8 Q. B., Div. 104. But this is just as wrong as the other. The doctrine there stated is known as that of Boone *vs.* Ayre, and applies only where there has been partial performance *accepted and retained*, and a failure in part is set up as a defence to the whole price, including that of the part received.

This doctrine is better stated in Behn *vs.* Burness, 3 Best & Smith, 755, by Williams, J., than in any book I have seen.

Speaking of the performance which is to precede or accompany a liability to pay, he says: "It is to be regarded as a warranty, that is to say, a condition, on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part, provided it has not been partially executed in his favor. If indeed he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, so to speak, perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrow sense of the word, viz: 'A stipulation by way of agreement for the breach of which compensation must be sought in damages;' and he cites Graves *vs.* Legg, 9 Exch., 707, as 'adopting the observation of Sergeant Williams, in the case of Boone *vs.* Ayre, 1 Saund., 320 d., sixth ed.,' which is the note on Pordage *vs.* Cole." On the other hand, where the contract itself gives the exact measure of compensation for what has been performed, the American authorities seem to settle the question that the rule of Boone *vs.* Ayre, does not apply as to the unperformed parts of the contract. Certainly the only reason for the rule has ceased, and no other than the one assigned by Ashhurst, J., in that case has ever been suggested, and this was admitted at the trial of this case to be correct. The cases, etc., are cited below.

This mode of stating the doctrine which as stated, by Ld. Mansfield has certainly misled many persons, is cited by Ld. Kenyon in Campbell *vs.* Jones, 8 Term R., 573, from the judgment of Ashhurst, J., with approbation.

If, after partial performance, and a benefit retained by the purchaser, he is permitted to set up a failure in part as a bar to the action, or to rescind, he will be free from any obligation to pay for what he has received and elects to retain. Baron Parke said, in Orendale *vs.* Wrebville and there are many other authorities, he must return what he got or pay for that.

The effect of non performance where there has been no benefit derived and retained, is that, "*It dissolves the contract.*" Martindale *vs.* Smith, 1 Q. B., 389, per Parke, B.

And, until Simpson *vs.* Crippin, no one had ever suggested that it did not, because of its being a partial breach only, unless the dictum or suggestion of Pattison, J., in Withers *vs.* Reynolds was meant to do so.

4. It has been rested on two other grounds. One, that the divisibility for performance splits the contract into as many distinct contracts as there are performances.

This is discarded utterly by Ld. Selburn in Mersey *vs.* Naylor, and ridiculed by Ld. Bramwell, in Houck *vs.* Muller, 8 Q. B., Div. 100.

It ignored the cardinal rule that all parts of all contracts on the one side, are the consideration for all parts of them on the other side, for Littledale, J., Mayfield *vs.* Wadsley, 8 B., Cr. 365, and per Ld. Bramwell in Mersey *vs.* Naylor.

The other ground for the rule is that it is the view of contracts entertained and acted on by respectable merchants. No evidence of that is forthcoming. The incessant litigation shows that it has not been so understood by the community, and Mr. Cohen's argument in Mersey *vs.* Naylor shows that the foremost men of the bar did not consider it settled at that time.

When Houck *vs.* Muller was tried, one of the judges, according to a report in the *Times*, took occasion to insult the defendant for setting up such a defence, styling it hair splitting. This may be called a third ground. I venture to call attention to the remarks of Ld. Cairns and others, in a case where a similar course was pursued as to a defence that the shipment was not *wholly* within the time stipulated. In Bowes *vs.* Shand, 2 Appeal Cases, 455. They said (in substance): (1.) "It is none of your business whether the stipulation is material or not, pages 463, 479. (2.) You are incompetent to determine that for the parties in the contract who alone are the proper judges of such matters, page 466. (3.) It is very easy for one familiar with the subject to see why what you think immaterial is very important, page 464. (4.) What you deem an unimportant clause is in fact the descriptive words of the subject; so that you are compelling a purchaser to take a different thing from the one he agreed to because you think the difference unimportant, page 480." But granting the rule is there now established, and that it can be reconciled with decisions which require the *whole* *contract* to be capable of performance according to its terms before there can be a duty to accept and consequent liability, what bearing has this rule on the claim now asserted, that the parts of the contract now sued on where so tendered or proposed to be performed, that the defendants were bound to accept?

There is no pretence that any one part was performed at all except as to the June shipment.

And this became immaterial under the pleadings, which treated the contract as a single contract.

If the English rule, however, is as was contended for, and these tenders were sufficient, the next point is—

Has the rule been adopted in the United States, or is this court prepared to adopt it?

I will re-state it and then show that it is not the rule here, and to adopt it requires a series of decisions to be overruled.

It is this—Where the contract intends that there shall be performance in distinct parcels at different times, and the price of each is by the contract separately ascertained and payable, then performance on the one side and payment on the other, are not conditions precedent to the contract continuing in force as to the other portions, and the failure or omission of one party does not entitle the other to treat the contract as at an end, unless the failure indicated an intention not to perform the rest of the contract.

The rule of this court, certainly, and it is submitted the rest of the United States is, that a breach in respect of any instalment at the option of the other side, absolves him from any further performance.

It is the rule as stated by Williams, J., in Behn *vs.* Burness, and no distinction is made by him between divisible and indivisible contracts.

The authorities are, in this court, Canal Company *vs.* Gorden, 6 Wallace, 562, it was a contract for building a canal, the price payable by instalments as the work progressed. Held, the contractor on failure to pay, could abandon the contract and sue for the work done. There was there also an express stipulation to pay interest on each instalment after it became due.

Rhode Island—King Phillip *vs.* Slater, 12 R. I., 82, was a contract like the present, and the purchaser was held entitled to abandon on non-performance of the first instalment, the rule in Simpson *vs.* Crippen was in terms rejected.

New York—Etting Woolen Mill Company *vs.* Martin, 5 Daly, 417, was a contract to make and deliver two hundred and thirty thousand yards of flannel at forty thousand yards a month. Held, that a failure to deliver any instalment, authorizes the purchaser to treat the contract as abandoned for the future.

See also Catlin *vs.* Tobias, 26 New York, 217; Grant *vs.* Johnson, 1 Selden, 252; Dey *vs.* Dey, 3 Wend., 361.

Massachussetts—Hill *vs.* Rewee, 11 Met., 268–71; Minnie *vs.* Bradley, 22 Pick, 459–60.

Pennsylvania—Raybold *vs.* ? Vorhees Williams, 30 Penna., 116 ~~268,~~ ? decides that any failure to comply by either party, discharges the other from the obligation to make further deliveries on a divisible contract. And that this failure cannot be condoned by an offer to pay a few days after the time appointed. Shinn *vs.* Bodine, 60 Penna., 182, assumes this to be the rule as the basis of the judgment, otherwise no argument would have been required.

To show the recognition of this as the rule at this time in that State, I cite a case of one of the highest courts of original jurisdiction in that State:

Miller *vs.* Blessing, *Legal Intelligencer* (Philadelphia) 1884, p. 253. In the Court of Common Pleas, Philadelphia. Contract for brick at $6.00 per M, to be delivered, as wanted. The failure to pay the price of those delivered when demanded, authorizes the vendor to refuse to deliver more, and entitles him to sue for what he has delivered. The purchaser cannot deduct the cost of supplying himself with the brick refused to be delivered *i. e.*, he is not entitled to treat the contract as subsisting, and set off the damages for non-performance after the rescission. There was no refusal to pay that looked like an intention not to comply in future, but a mere attempt by the purchaser to postpone the time of payment.

Maine—Daniel *vs.* Howard, 30 Maine, 258. Ice was sold payable as removed. A failure to pay for the quantity first taken at the time appointed, discharges the seller from the duty to deliver any more.

Vermont—Tyson *vs.* Doe, 5 Vermont, 571, a refusal to accept one load of a quantity of goods to be paid for as delivered, entitles the seller to refuse to deliver any more, and sue for the amount delivered and accepted. The same rule was applied in Fletcher *vs.* Cole, 23 Vermt., 114, where a quantity of lumber was sold to be paid for as taken. Prefle *vs.* Bolton, 27 Vermont, 249, a refusal to pay for an instalment, authorizes the seller to abandon the contract, and sue for what has been performed.

New Hampshire—Haines *vs.* Tucker, 50 N. H., 309.

Illinois—Bradley *vs.* King, 44 Illinois, 339, 41.

It is stated as the American rule by the editor, 2 Chitty on Contracts, page 913, note.

In note 26, to Corbin's edition of Benjamin on Sales, edition of 1883, sec. 909, the annotator says: "The case of Simpson *vs.* Crippen has been much discussed in America. * * * The weight of authority seems to be against it," and he, after a review, states the rule as I have stated it, as to the effect of partial deliveries, *if accepted*, as removing the right to abandon up to that time, but leaving it for all future instalments in full force

The subject is treated by Dr. Wharton. 1. Wharton on Contracts, Sec. 580, and his conclusion is that the

American authorities tend to establish the rule that a failure as to an instalment entitles the other party to abandon and sue for what has been done.

The fact that the partial shipment for February was accepted and paid for, does not bring the case within the rule of Boone *vs.* Ayre, as the benefit thus received is exactly measured by the contract, and the price has been paid.

That partial performance does not always introduce the rule of Boone *vs.* Ayre; see Mersey *vs.* Naylor, 9 Appl., 446, per Ld. Bramwell. And in the United States it never does when the value of the part performance is measured by the contract itself; Bradley *vs.* King; Hall *vs.* Erin; Haines *vs.* Tucker; Dromel *vs.* Howard; Minie *vs.* Bradley; Catlin *vs.* Tobias; Grant *vs.* Johnson; Dey *vs.* Dey, cited above.

I will now comment on the citations on the plaintiffs' brief other than those already noticed, which seem to establish in that country the new rule that recission, or abandonment, is not always a remedy for the failure to perform by the other party in case of divisible contracts, as it is admitted to be when the subject is a single one. Borrowman *vs.* Free, L. R., 4 Q. B. Div. 500, does not support the rule for which it is cited. The tender there was of a whole cargo, which was the thing sold, and would have certainly been a good tender but for the effect of the previous tender. All that was decided was an ineffectual tender rejected does not preclude from making a proper tender.

First.—We contend, under the authority of Reuter *vs.* Sala, that the naming of the ship made that cargo the thing tendered, and it was impossible after that to substitute another, because the contract required the election by the seller as soon as he knew of the shipment.

Second.—The cargoes substituted were not good tenders, if none other had ever been made. The substituted tenders were for April 1350, when about 1000 tons was the proper quantity; in May 1100.

If notice of shipment is essential, as it is settled to be, Benjamin on Sales, 588, it is impossible to allow this to be varied, especially after the refusal to accept.

The refusals are as plain as can be made, (pages 46–48). We intend to treat ourselves as absolved. after a a positive refusal, is surely not an uncertain refusal to accept.

The citation from Ld. Bramwell, that even he admits there could be no refusal to go on after part performance, must have been an oversight. Sir Geo. Jessel intimated that he understood him to say this, but Ld. Bramwell says: "If I said it I recall it, because I do not think so. It depends on the nature of the contract and the circumstances of the case." (9 Appeal Cases, 446.) This shows he knew the real meaning and ground of the rule, and of Boone *vs.* Ayre, and was not misled by words.

Mill Dam *vs.* Hovey, 21 Pick, is, I submit, entirely misunderstood.

On page 37, Shaw, C. J., points out the rule he is about to apply—*viz.*, that of Boone *vs.* Ayre—which is cited as his authority; and he emphatically decides that even after there has been a partial performance there *may* be covenants, the failure on which does authorize a termination of the contract, and he then adds if these do not imply a refusal to perform in future, that the remedy is by action for the damages, or set off.

It is this same judge who decided that if the partial performance can be compensated for exactly under the terms of the contract, the fact of partial performance does not prevent recession for subsequent failures. Hill *vs.* Rewee, 11 Metcalf, 272, which compare with his statement of the converse when the contract does not afford a standard of compensation in Miner *vs.* Bradley, 22 Pick, 457.

2 Chitty, 292, is cited for the doctrine of Simpson *vs.* Crippen. The author is speaking of cases where there has been partial performance, and the benefit is retained. Franklin *vs.* Miller, cited as his authority, is a case of that kind, and as he stated the doctrine of Hoar *vs* Rannie, without qualification on the preceding page, it is not probable that he intended to state one diametrically opposed to it in the next without remark.

The London Gas *vs.* Chelsea, 86 B. N., § 215, is nothing but the rule of Boons *vs.* Ayre, and for the very reason given by Ashhurst, J., for that rule.

But it would be difficult to find a case which better proves the necessity and justice of the rule I contend for—*viz.*, that the breach of a continuing contract will justify the abandonment, or recission, for the future. It was a long contract to supply light for the streets of a parish. To assert that because the work had been done for one night the authorities could not terminate the contract for subsequent failures, but must rely on set off, &c., is surely absurd. They were subjecting themselves to indictment whenever a failure occurred, and all preparation to meet an omission by the contractor, which must be daily, would be lost if on any particular nights the contractor performed his duty.

Weaver *vs.* Sessions, 6 Taunton, cited in Chitty, is another instance of the rule in Boone *vs.* Ayre.

The reasons for the decision in Johnsannon *vs.* Young, 4 B. S., 296, certainly support the proposition of the plaintiff in error. But the case, as raised by the pleadings, does not.

There is nothing to show there was any duty to pay till after delivery. There was an admitted part performance, and the plea covered the liability for so much as had been performed, as well as the future, so that the plea was bad under the rule of Boone *vs.* Ayre.

In Scott *vs.* Kittaning there had been no election to abandon for non-performance, and the partial performance had been accepted and retained, and the objection was as to the quality of what had been received.

In Lucesco *vs.* Brewer the rule of Boone *vs.* Ayre was essential to justice. A failure to lend the whole of a sum borrowed was treated as a bar to a right to recover what had been loaned

In Morgan *vs.* McKee the contracts were distinct. It was a mere dictum that the same rule applied to divisible as to distinct contracts.

The other English cited I have noticed.

As to real property contracts, they rest on an entirely different rule.

At law (the rule as to specific performance in Equity is out of the question) the question is whether they are really independent purchases included in an agreement, or were as commercial contracts, are presumed to be really one purchase or contract, as is fully set out in the elaborate judgment, on this point, of Lord Alvanly, in Johnson *vs.* Johnson, 3 Bos. Puller, 162.

No case can be cited, showing more clearly than that one, that, at that time, it had never occurred to any English Judge that you could split up what really was one contract into several, because the subjects and the prices were distinct.

Therefore, if the case is to turn merely on the right of the defendants to rescind, the question for this Court is, whether we are to accept the modern English rule that the right of recission for a failure to perform what is certainly a duty, precedent to any liability in a commercial contract, is excluded because the performance is divided in the respect of time, quantity, and price.

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